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No.

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IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court's decision in *New York* v. *United States*, 505 U.S. 144 (1992), holds that the Constitution's fundamental federal structure does not permit Congress to "directly . . . compel the States to require or prohibit [certain] acts." *Id.* at 166. In September 2013, the U.S. Court of Appeals for the Third Circuit upheld the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq.*, against a constitutional challenge under *New York* by construing PASPA's proscription against States "authoriz[ing]" sports wagering "by law" narrowly to prohibit only the "affirmative 'authorization by law' of gambling schemes," and not repeals by States of existing sports wagering prohibitions. *See Nat'l Collegiate Athletic Ass'n* v. *Gov. of N.J.* (*Christie I*), 730 F.3d 218, 233 (3d Cir. 2013). After New Jersey then proceeded to repeal certain of its prohibitions on sports wagering in specified venues in the State, the *en banc* court reversed course and interpreted PASPA as making it "unlawful" for New Jersey to repeal its prohibitions and affirmed an injunction that requires the State to reinstate the repealed state-law prohibitions. The court then held that it was constitutional for federal law to dictate the extent to which States must maintain their prohibitions on sports wagering.

The question presented is:

Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York* v. *United States*, 505 U.S. 144 (1992)?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Defendants below were Christopher J. Christie, Governor of the State of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; Frank Zanzuccki, Executive Director of the New Jersey Racing Commission; the New Jersey Thoroughbred Horsemen's Association, Inc.; the New Jersey Sports & Exposition Authority; Stephen M. Sweeney, President of the New Jersey Senate; and Vincent Prieto, Speaker of the New Jersey General Assembly.

Plaintiffs below were the National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball.

The United States of America participated as an *amicus curiae* in the proceedings below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

A. The Professional And Amateur Sports Protection Act 4

B. The 2012 Sports Wagering Law 5

C. The *Christie I* Litigation 6

D. The *Christie I* Petition For Certiorari 7

E. New Jersey Repeals Its Prohibitions On Sports Wagering In Certain Venues 9

F. *Christie II* District Court Proceedings 11

G. The Third Circuit Panel Decision In *Christie II* 12

H. The Third Circuit *En Banc* Decision In *Christie II* 13

REASONS FOR GRANTING THE PETITION 16

I. THE THIRD CIRCUIT'S DECISION FLOUTS THIS COURT'S ANTI-COMMANDEERING PRECEDENTS, DIMINISHES THE ACCOUNTABILITY OF STATE OFFICIALS, AND INFRINGES STATES' SOVEREIGN RIGHTS 19

A. The Third Circuit's Opinion Departs From This Court's Anti-Commandeering Precedents 21

B. The Third Circuit's Ruling Diminishes The Accountability Of Elected Officials 29

C. The Third Circuit's Construction Of PASPA Infringes State Sovereignty By Perpetuating Uncertainty As To How States May Exercise Their Sovereign Rights 31

CONCLUSION 34

TABLE OF APPENDICES

Page

APPENDIX A: Opinion of the *En Banc* United States for the Third Circuit (Aug. 11, 2016) 1a

APPENDIX B: Order Amending Opinion (Aug. 11, 2016) 47a

APPENDIX C: Opinion of the United States Court of Appeals for the Third Circuit (Aug. 25, 2015) 49a

APPENDIX D: Opinion of the United States District Court District of New Jersey Granting Plaintiffs' Motion for Summary Judgment and for a Permanent Injunction (Nov. 21, 2014) 76a

APPENDIX E: Order of the United States District Court District of New Jersey (Nov. 21, 2014) 114a

APPENDIX F: Opinion of the United States Court of Appeals for the Third Circuit (Sept. 17, 2013) 117a

APPENDIX G: Order Sur Petitions for Rehearing *En Banc* (Oct. 14, 2015) 201a

APPENDIX H: Constitutional and Statutory Provisions Involved 204a

U.S. Const. amend. X 204a

28 U.S.C. § 3701 ..... 204a

28 U.S.C. § 3702 ..... 205a

28 U.S.C. § 3703 ..... 206a

28 U.S.C. § 3704 ..... 206a

N.J. Stat. § 5:12A-1 .... 208a
N.J. Stat. § 5:12A-2 ..... 209a
N.J. Stat. § 5:12A-3 ..... 212a
N.J. Stat. § 5:12A-4 ..... 213a
N.J. Stat. § 5:12A-4.1 ..... 214a
N.J. Stat. § 5:12A-5 ..... 216a
N.J. Stat. § 5:12A-6 ..... 216a
P.L. 2014, c. 62 ..... 218a

APPENDIX I: Letter from W. Lee Rawls, Assistant Attorney General, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991)..... 223a

TABLE OF AUTHORITIES

Page(s)

Cases

Alden v. *Maine*,
527 U.S. 706 (1999) 29

Brown v. *EPA*,
521 F.2d 827 (9th Cir. 1975) 24

Coleman v. *Glynn*,
983 F.2d 737 (6th Cir. 1993) 34

Conant v. *Walters*,
309 F.3d 629 (9th Cir. 2002) 25

Coyle v. *Smith*,
221 U.S. 559 (1911) 25

FERC v. *Mississippi*,
456 U.S. 742 (1982) ..... *passim*

Hodel v. *Va. Surface Mining & Reclamation Ass'n*,
452 U.S. 264 (1981) 14, 21, 26

Martin v. *Hunter's Lessee*,
14 U.S. (1 Wheat.) 304 (1816) 19

Nat'l Collegiate Athletic Ass'n v. *Christie*,
926 F. Supp. 2d 551 (D.N.J. 2013) 6

Nat'l Fed'n of Indep. Bus. v. *Sebelius*,
132 S. Ct. 2566 (2012) 28, 34

New York v. *United States*,
505 U.S. 144 (1992) ..... *passim*

Pennhurst State Sch. & Hosp. v. *Halderman*,
451 U.S. 1 (1981) 34

Petersburg Cellular P'ship v. *Bd. of Supervisors*,
205 F.3d 688 (4th Cir. 2000) 28

Printz v. *United States*,
521 U.S. 898 (1997) 19, 24

Reno v. *Condon*,
528 U.S. 141 (2000) 14, 25, 29

South Carolina v. *Baker*,
485 U.S. 511 (1988) 14, 26, 28, 29

Testa v. *Katt*,
330 U.S. 386 (1947) 27

Texas v. *White*,
74 U.S. (7 Wall.) 700 (1869) 19

Statutes

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

28 U.S.C. § 3702 4

28 U.S.C. § 3704 5

N.J. P.L. 2011, c. 231 ..... 2, 5

N.J. P.L. 2014, c. 62 ..... 2, 9, 10

N.J. Stat. Ann. § 2A:40 *et seq.* 9

N.J. Stat. Ann. § 2C:37-1 *et seq.* 9

N.J. Stat. Ann. § 5:12-1 *et seq.* 9

Professional and Amateur Sports
Protection Act of 1992, 28 U.S.C.
§ 3701 *et seq* ..... *passim*

Other Authorities

Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 U.C.L.A. L. Rev. 74 (2015) 33

Will Green, "Will New Jersey Take A Third Swing At Legal Sports Betting Via 'Friends and Family' Approach?", *Legal Sports Report* (Aug. 22, 2016) 18

S. Rep. No. 102-248 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553 4

Regulations

N.J. Admin. Code § 13:69N-1.1 *et seq.* 5

PETITION FOR A WRIT OF CERTIORARI

Petitioners Christopher J. Christie, David L. Rebuck, and Frank Zanzuccki ("State Petitioners") and Stephen M. Sweeney and Vincent Prieto ("Legislator Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the *en banc* court of appeals is not yet published but is available at ---F.3d---, 2016 WL 4191891 (3d Cir. Aug. 9, 2016). *See* Pet. App. A. The opinion of the three-judge panel of the court of appeals is reported at 799 F.3d 259 (3d Cir. 2015). *See* Pet. App. C.

The opinion of the district court granting summary judgment to the respondents and the order enjoining the State and Legislator Petitioners from giving effect to a repeal of state-law prohibitions on sports wagering is reported at 61 F. Supp. 3d 488 (D.N.J. 2014). *See* Pet. Apps. D, E.

JURISDICTION

The court of appeals entered its opinion on August 9, 2016 after *en banc* rehearing was granted on October 14, 2015. *See* Pet. App. G. An amended opinion was issued on August 11, 2016 to reflect that Judge Restrepo joined Judge Fuentes's dissent. That amendment did not alter the filing date of the judgment. *See* Pet. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the Third Circuit was based on 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Tenth Amendment, the Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701 *et seq.* ("PASPA"), New Jersey's Sports Wagering Law, P.L. 2011, c. 231 ("2012 Law"), and its 2014 repeal, P.L. 2014, c. 62 ("2014 Act"), are set forth at Appendix H to this petition.

STATEMENT

PASPA purports to make it unlawful for States to "authorize by law" gambling on sports. In three divided, irreconcilable, and fundamentally incomprehensible decisions, the Third Circuit rejected New Jersey's challenge that PASPA unconstitutionally commands how it regulates such gambling within its borders.

In particular, the Third Circuit concluded, in a divided *en banc* decision (with dissents by both the author and dissenter in *Christie I*), that PASPA's language precluding States from "authoriz[ing]" sports wagering "by law" bars New Jersey not only from licensing sports wagering, but also from enacting legislation repealing its sports wagering prohibitions in casinos and at racetracks. The Third Circuit reached that conclusion notwithstanding its panel decision three years earlier that PASPA was constitutional precisely because it *did not* prohibit States from repealing prohibitions on such wagering and therefore left the States ample room to define their own regulatory policies with respect to that type of gambling. As a result of the Third Circuit's most recent decision,

New Jersey now is compelled by federal law and federal courts to maintain state-law prohibitions that its elected officials chose to lift.

This federal takeover of New Jersey's legislative apparatus is dramatic, unprecedented, and in direct conflict with this Court's Tenth Amendment jurisprudence barring Congress from controlling how the States regulate private parties. Never before has congressional power been construed to allow the federal government to dictate whether or to what extent a State may repeal, lift, or otherwise modulate its own state-law prohibitions on private conduct. And never before has federal law been enforced to command a State to give effect to a state law that the State has chosen to repeal. The federal government lacks power to compel States to "regulat[e] pursuant to Congress' direction." *New York* v. *United States*, 505 U.S. 144, 174 (1992). It therefore must also lack power to command through a federal-court injunction that a State maintain on its books a state-law prohibition on private conduct that the State, as a matter of *its* sovereign authority over *its* citizens, has decided to repeal.

If Congress can freeze in place existing state laws by prohibiting contrary state-law "authorizations," then the federal government can effectively force States to enact federal policies and thus will have greatly aggrandized its own power while foisting accountability for those policies entirely onto the States. Future efforts by States to legalize private conduct currently prohibited by state law—anything from recreational use of marijuana, to carrying concealed firearms, to working on Sundays—can be thwarted not just by a direct federally enforced prohibition of that

conduct, but now also by a federal ban on state legislation that "authorizes" such conduct. This is not a minor intrusion on state sovereignty. It is a sea change to our system of federalism. This Court should grant the petition to protect the Constitution's carefully calibrated federal-state design and restore the balance between state and federal power that the Third Circuit's decision has so thoroughly upended.

A. The Professional And Amateur Sports Protection Act

For much of the country's history, nearly all States prohibited wagering on sports. Nevada legalized sports wagering in 1949, but as of 1992, no other State had broadly permitted such wagering. In that year, in response to a suggestion that other States were considering emulating Nevada by relaxing their prohibitions on sports wagering (*see* S. Rep. No. 102-248, at 5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3556), Congress enacted PASPA, which the U.S. Department of Justice opposed because it raised serious "federalism issues." Pet. App. H.

Unwilling to take the responsibility for prohibiting sports betting directly under federal law—perhaps due to its popularity in Nevada—Congress in PASPA purported to regulate the content of ***state laws*** concerning sports wagering—by making it "unlawful" for "***a governmental entity*** to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering (28 U.S.C. § 3702(1) (emphasis added)) or for an individual to do the same "pursuant to [a state] law" (*id.* § 3702(2)).

Nevada was, of course, exempted from PASPA's proscription of state regulatory authority of sports wagering and remained free to license and regulate sports wagering as it had since 1949. Pet. App. 123a. The three other States that had legalized limited sports wagering schemes in connection with their state lotteries—Montana, Delaware, and Oregon—also were permitted by PASPA to continue to sponsor those very limited schemes. Finally, PASPA also gave New Jersey (but no other State) permission to authorize, license, and otherwise regulate sports wagering, but only in Atlantic City, and only if a measure were enacted within one year of PASPA's effective date. 28 U.S.C. § 3704(a)(3). New Jersey, at that time, chose not to do so.

B. The 2012 Sports Wagering Law

Two decades later, faced with a massive, unregulated underground gambling industry, New Jersey voters approved an amendment to the State's constitution that permitted the Legislature to legalize, regulate, and control sports wagering. The Legislature soon did so, passing the 2012 Law, P.L. 2011, c. 231, with overwhelming bipartisan support. The 2012 Law modified the State's longstanding ban on sports wagering and provided for the licensing of sports-wagering pools at casinos and racetracks in the State. Regulations setting up a comprehensive regime for the licensing and close supervision of sports-wagering pools—including licensing fees, internal control approvals, reserve requirements, and detailed financial documentation—soon followed. *See* N.J. Admin. Code § 13:69N-1.1 *et seq.* In short, the 2012 Law vested state regulators with comprehensive supervisory authority (much like Nevada) over nearly every aspect of

sports wagering in New Jersey and ensured that no sports wagering would take place unless it was affirmatively licensed, regulated, and approved by state authorities.

C. The *Christie I* Litigation

Several professional sports leagues and the National Collegiate Athletic Association (the "Leagues") filed a lawsuit shortly after the 2012 Law was passed, challenging it and the proposed regulations as violating PASPA.

The State responded that PASPA is unconstitutional because it mandates that States "regulat[e] pursuant to Congress' direction," in violation of the anti-commandeering principle set forth in *New York*, 505 U.S. at 174.

The district court granted summary judgment to the Leagues on the ground that Congress, in enacting PASPA, was exercising only its "power to *restrict*, rather than *compel*," and thus PASPA did not violate the anti-commandeering doctrine. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, 926 F. Supp. 2d 551, 571 (D.N.J. 2013).

A divided court of appeals affirmed, but on different grounds. The majority acknowledged that a federal statute requiring States to maintain prohibitions on private conduct would raise "a series of constitutional problems." Pet. App. 160a. To avoid them, the majority construed PASPA as not "prohibit[ing] New Jersey from repealing its ban on sports wagering." *Id.* at 158a, 160a. As such, the panel majority concluded that the States retained "much room . . . to make their own policy"; they could "enforce the laws they choose

to maintain." *Id.* at 161a, 163a. "*All that is prohibited,*" the majority declared, "is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] *by law*' of gambling schemes." *Id.* at 158a (first emphasis added).

Judge Vanaskie dissented from the majority's constitutional analysis of PASPA, declaring that "PASPA prohibits [S]tates from authorizing sports gambling and thereby directs how *[S]tates* must treat such activity"—to wit, they must either "allow[] totally unregulated betting on sporting events or prohibit[] all such gambling" (Pet. App. 178a), a choice that he did not believe left States much "room" to "make their own policy on sports wagering" (*id.* at 197a n.9). This lack of choice, he continued, "violates the principles of federalism as articulated by the Supreme Court in . . . *New York* . . . and *Printz*." *Id.* at 178a.

D. The *Christie I* Petition For Certiorari

The defendants petitioned for certiorari, arguing that even as narrowed by the Third Circuit, PASPA remained unconstitutional. The State urged that the "ability of the States to convey a 'label of legitimacy' on private conduct" by licensing or authorizing it by law "lies at the heart of their retained sovereignty" and that PASPA improperly infringes on that sovereignty by "regulat[ing] the approval or disapproval expressed by the States." State Pet. for Certiorari at 2–3, *Christie* v. *Nat'l Collegiate Athletic Ass'n*, Nos. 13-967, 13-979, and 13-980 (U.S. Feb. 12, 2014). That PASPA "frame[d] its dictate as a prohibition" against authorization of sports wagering, the State argued,

did not diminish the unconstitutional exercise of federal control over the State's regulation of private conduct. *Id.* at 3.

The Leagues denied any commandeering of state regulatory authority because "[n]othing in [the] unambiguous language [of PASPA] compels [S]tates to prohibit or maintain *any* existing prohibition on sports gambling." Brief of Leagues in Opposition at 23, *Christie I*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014) (hereinafter, "Leagues Opp.") (emphasis added). The Leagues maintained that PASPA was "like any other express preemption clause," specifying "only what [S]tates *may not* do, which is license or authorize sports gambling." *Ibid.*; *see also ibid.* ("PASPA does not prohibit [S[tates from eliminating sports gambling prohibitions entirely should they so choose, or even require [S]tates to enforce whatever prohibitions they opt to maintain."). Indeed, the Leagues agreed that "[w]hen a [S]tate merely lifts an existing prohibition but does not authorize any sports gambling, there is no 'gambling pursuant' to state law." *Id.* at 24 n.4.

The United States made the same argument in its opposition brief, urging this Court that, under the Third Circuit's construction of PASPA, States were free to repeal their prohibitions on sports wagering "*in whole or in part.*" Brief for the United States in Opposition at 11, *Christie I*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014) (hereinafter, "U.S. Opp.") (emphasis added). This Court denied the petition.

E. New Jersey Repeals Its Prohibitions On Sports Wagering In Certain Venues

After this Court denied certiorari, the New Jersey Legislature took the Third Circuit, the Leagues, and the United States at their word that a State may repeal its sports wagering ban, in the words of the United States, "in whole or in part." U.S. Opp. at 11. The Legislature passed the 2014 Act, P.L. 2014, c. 62—again with an overwhelming bipartisan consensus—and the Governor signed the bill into law the following day. In sharp contrast to the 2012 Law, the 2014 Act does not affirmatively license or authorize sports wagering or create a regulatory scheme around it. Instead, the 2014 Act "partially repeal[s] the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sports contests or athletic events." *Id.*

Specifically, the 2014 Act repeals provisions in the criminal code (*see* N.J. Stat. Ann. § 2C:37-1 *et seq.*); the civil code (*see* N.J. Stat. Ann. § 2A:40 *et seq.*), including the Casino Control Act (N.J. Stat. Ann. § 5:12-1 *et seq.*), and other provisions in chapter 5 of Title 5 of the Revised Statutes (governing racetracks); as well as "any rules and regulations" that "prohibit participation in or operation of" a sports-wagering pool to the extent those laws apply at casinos, racetracks, and former racetracks (P.L. 2014, c. 62, § 1).[1] It also repeals the 2012 Law in its entirety (*id.* § 5); and repeals

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[1] The 2014 Act also limits the repeal to "the placement and acceptance of wagers on professional, collegiate, or amateur sports contests or athletic events by persons 21 years of age or older" and excludes "a collegiate sport contest or . . . athletic event that takes place in New Jersey or a sport contest or athletic

"any rules and regulations that may require or authorize any State agency to license, authorize, permit, or otherwise take action to allow any person" to engage in sports wagering (*id.* § 1). The 2014 Act further expressly states that its provisions are "not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law" sports wagering, but instead are to be "construed to repeal State laws and regulations" at designated locations. *Id.* § 2. Considered as a whole, the 2014 Act thus makes New Jersey's pre-existing civil and criminal prohibitions on sports wagering inapplicable—indeed, nonexistent—as to most sports wagering activities undertaken in casinos and current and former racetracks in the State.

By design, the 2014 Act contains none of the licensing and regulatory provisions that were the centerpiece of the 2012 Law and that *Christie I* held violated PASPA. The 2014 Act does not require prospective operators to acquire any special license to operate a sports pool, nor does it restrict the individuals or entities that are eligible to operate a sports pool at a casino, racetrack, or former racetrack. As the undisputed record before the district court makes clear, the State's primary gaming and horse racing regulatory agencies—the Division of Gaming Enforcement, the Casino Control Commission, and the New Jersey Racing Commission—are stripped of authority under the 2014 Act to engage in any regulation of sports wagering, including investigating the background or financial health of sports-wagering vendors (Dist. Ct. D.E.

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event in which any New Jersey college team participates regardless of where the event takes place." P.L. 2014, c. 62 § 1.

52-1 ¶¶ 26, 27); evaluating employees or their credentials (*id.* ¶ 30); or requiring sports-pool lounges to use specific surveillance and security measures (*id.* ¶ 33). In short, under the 2014 Act, the State would play *no role* in licensing, authorizing, operating, or regulating sports betting in those locations where New Jersey's prohibitions had been repealed. Rather, any sports betting by adults that would take place in those locations would be a purely private matter, outside the purview of state laws.

F. *Christie II* District Court Proceedings

The Leagues responded to the 2014 Act with a new lawsuit alleging that the Act constitutes an attempt to "sponsor, operate, advertise, promote, license, or authorize gambling on amateur and professional sports at state-licensed casinos and horse racetracks." Dist. Ct. D.E. 1 ¶ 1. Because the 2014 Act's repeal is limited to certain locations that otherwise are licensed by the State, the Leagues argued, "the 2014 [Act] is an authorization, rather than the repeal that it purports to be." *Id.* ¶ 7.

The district court held that the 2014 Act violated PASPA and permanently enjoined the State "from violating PASPA through giving operation or effect to the 2014 Law in its entirety." Pet. App. 113a. In so holding, it thus requires the State to resurrect and maintain prohibitions on private conduct the State itself chose to repeal. The court reasoned that, notwithstanding the United States' position that New Jersey was free to repeal its prohibitions "in whole or in part" (U.S. Opp. at 11), *Christie I* "interprets PASPA to allow [S]tates only . . . two options": "either maintain

[their] prohibition[s] on sports betting or . . . completely repeal" them." *Id.* at 99a–100a.

G. The Third Circuit Panel Decision In *Christie II*

A divided panel of the Third Circuit affirmed, though not on the rationale provided by the district court, and only after distancing itself from the construction of PASPA in *Christie I*. Without acknowledging that *Christie I* construed PASPA to avoid "a series of constitutional problems" (Pet. App. 160a), the *Christie II* panel majority concluded that the 2014 Act "authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling." *Id.* at 60a. According to the majority, "[t]hat selectiveness constitutes specific permission and empowerment" that violates PASPA. *Ibid.*

In holding that a refusal to prohibit constitutes "specific permission and empowerment" by a State in violation of PASPA, the *Christie II* panel majority called into doubt whether or how a State ever could legalize or even fail to prohibit sports wagering within its borders consistent with PASPA. The *Christie II* panel majority thus plainly contradicts *Christie I*'s holding that PASPA left the States "much room" to formulate policy with respect to sports wagering, including room to repeal pre-existing prohibitions. Pet. App. 161a. Yet the *Christie II* panel majority did not otherwise address the "series of constitutional problems" that *Christie I* foresaw if PASPA were construed to prohibit States from repealing or amending their prohibitions on sports wagering. Instead, it cast aside

the State's commandeering objections simply as having been rejected in *Christie I*. *See id.* at 59a n.5 (rejecting the constitutional argument by stating "we held otherwise in *Christie I* and we cannot and will not revisit that determination here"—despite completely overriding the reasoning in *Christie I* that provided the basis for that conclusion).

Judge Fuentes—the author of *Christie I*—dissented, stating that the majority's reasoning that a "partial repeal amounts to authorization" was "precisely the opposite of what we held in *Christie I*." Pet. App. 67a, 72a. *Christie I* had held that "'[n]othing in [PASPA's] words *requires* that the [S]tates keep any law in place,'" and it was on that basis that the majority "found PASPA did not violate the anti-commandeering principle." *Id.* at 72a. "If withdrawing prohibitions on 'some' sports wagering is the equivalent to authorization by law," Judge Fuentes explained, "then withdrawing prohibitions on *all* sports wagering must be considered authorization by law" as well, leaving New Jersey "with no choice at all" with respect to state regulation of sports wagering within its borders. *Id.* at 71a–72a.

H. The Third Circuit *En Banc* Decision In *Christie II*

The Third Circuit granted rehearing *en banc* and affirmed the district court by a vote of 9-to-3. The *en banc* majority adopted the panel majority's analysis as to the question whether the 2014 Law was an "authoriz[ation] by law" in violation of PASPA (Pet. App. 10a), but "excise[d]" "as unnecessary dicta" the central and critical portions of *Christie I* holding that PASPA was constitutional precisely because it permits States

to repeal prohibitions on sports wagering (*id.* at 23a). Thus, the majority held that "a [S]tate's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA." *Ibid.*

Turning to the constitutional question, the majority began by acknowledging that "Congress 'lacks the power directly to compel the States to require or prohibit' acts which Congress itself may require or prohibit." Pet. App. 18a (quoting *Christie I*, 730 F.3d at 227 (quoting *New York*, 505 U.S. at 166)). But the majority nonetheless found that PASPA's prohibition of the 2014 Act was "more akin to those laws upheld in" *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), *FERC* v. *Mississippi*, 456 U.S. 742 (1982), *South Carolina* v. *Baker*, 485 U.S. 511 (1988), and *Reno* v. *Condon*, 528 U.S. 141 (2000), "and distinguishable from those struck down in *New York* and *Printz*." Pet. App. 22a.

The majority characterized PASPA as a prohibition on state action—not as a positive requirement that the States "enact laws or implement federal statutes or regulatory programs" (Pet. App. 19a)—and "reject[ed]" New Jersey's argument that prohibiting a repeal such as the 2014 Act requires New Jersey "to affirmatively keep the prohibition on the books" (*id.* at 23a). The majority reasoned that PASPA's prohibition on limited repeals still "afford[s]" States "sufficient room . . . to craft their own policies." *Ibid.* But, in describing that supposed "room," the majority said only that "not all partial repeals are created equal." *Id.* at 24a. It suggested that a law that permitted a "*de minimis*" amount of wagering between family and

friends might be permitted under PASPA (*ibid.*), but did not explain why that would not constitute a forbidden "authoriz[ation] by law" (*ibid.*). Instead, it decreed it "need not . . . articulate a line" demarcating which repeals a State is entitled to enact. *Ibid.*

The majority thus reached the remarkable and unprecedented conclusion that the Constitution's federal structure affords to Congress the power to prohibit States from repealing their own laws.

Judge Fuentes, Judge Restrepo, and Judge Vanaskie dissented. Judge Fuentes reprised the themes of his dissent from the panel opinion, taking issue with the majority's attempt to "infer[]" authorization by law from a repeal that did not "grant . . . permission" to anyone and left "no laws governing sports wagering" at selected locations. Pet. App. 28a, 31a. In short, it was not the kind of "specific legislative enactment that affirmatively allows the people of the [S]tate to bet on sports"; "[a]ny other interpretation," he said, "would be reading the phrase 'by law' out of the statute." *Id.* at 28a.

To demonstrate that the majority's analysis lacked logical foundation, Judge Fuentes posed a hypothetical in which the State repealed all of its sports waging prohibitions and "later enacted limited restrictions regarding age requirements and places where wagering could occur." Pet. App. 32a. "Surely," he said, "no conceivable reading of PASPA would preclude a [S]tate from *restricting* sports wagering in this scenario. Yet the 2014 Repeal comes to the same result" and is deemed unlawful. *Ibid.*

Judge Vanaskie wrote separately, explaining that his "skepticism" about PASPA's constitutionality from

Christie I was "validated by today's majority opinion" and the disappearance of any "room" that might once have existed for States to make policy. Pet. App. 35a. "Implicit in today's majority opinion and *Christie I*," he wrote, "is the premise that Congress lacks the authority to decree that States must prohibit sports wagering, and so both majorities find some undefined room for States to enact partial repeals of existing bans on sports gambling." *Id.* at 36a. But this "shifting line approach to a State's exercise of its sovereign authority is untenable," and "[t]he bedrock principle of federalism that Congress may not compel the States to require or prohibit certain activities cannot be evaded by the false assertion that PASPA affords the States some undefined options." *Ibid.* Under the *en banc* majority's opinion in *Christie II*, Judge Vanaskie predicted, "no repeal of any kind will evade the command that no State 'shall . . . authorize by law' sports gambling." *Id.* at 42a. This Court, he said, "has never considered Congress' legislative power to be so expansive." *Id.* at 45a.

REASONS FOR GRANTING THE PETITION

Two years ago, New Jersey petitioned for certiorari on the ground that PASPA, even as narrowed by the Third Circuit in *Christie I*, unconstitutionally commandeered the State's government by forcing it to prohibit sports betting and preventing it from enacting a regime to license, regulate, and control sports betting at the State's casinos and racetracks. The Leagues successfully urged the Court to reject the petition by insisting that the narrowly construed statute does not infringe New Jersey's sovereignty because it does not "compel [S]tates (or state officials) to do any-

thing"; it "only *prohibits* [S]tates from licensing or authorizing sports gambling." Leagues Opp. at 18. The United States went further, representing to the Court that PASPA "does not even obligate New Jersey to leave in place the state law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment" and that the State was "free to repeal those prohibitions *in whole or in part*." U.S. Opp. at 11 (emphasis added).

When New Jersey acted in reliance on those representations, the Third Circuit reversed course. New Jersey, the *en banc* court held in *Christie II*, was not "free to repeal [its] prohibitions in whole or in part," as the United States had argued to this Court; instead, the *en banc* majority held that PASPA prohibits a state law that results in the occurrence of sports wagering that, "absent the [repeal]," would be prohibited under state law. Pet. App. 12a. And while the Leagues had insisted PASPA does not "compel [S]tates (or state officials) to do anything" (Leagues Opp. at 18), the injunction affirmed by the Third Circuit directly compels petitioners to maintain in effect state-law prohibitions that New Jersey officials, in accordance with the wishes of the people who elected them, repealed. And, state officials are, of course, obliged under New Jersey's constitution to enforce these prohibitions as long as they are on the books.

When petitioners sought certiorari of the Third Circuit's earlier decision upholding its much narrower construction of PASPA, the Leagues argued in opposition that PASPA is a narrow statute that has rarely been challenged and thus is unworthy of this Court's review. But after the *en banc Christie II* decision,

whatever PASPA is, it is not narrow. Whereas *Christie I*'s construction of PASPA (compelled by principles of constitutional avoidance) supposedly left States with "much room" to "make their own policy" through repeals of prohibitions and waivers of enforcement (Pet. App. 161a), that "room" now seemingly has shrunk so much as to preclude nearly any enactment that relaxes state-law prohibitions on sports wagering as to particular persons or places. Indeed, while the supposed existence of certain options for legalization of sports wagering was vital to the Third Circuit's constitutional analysis, the *en banc* decision backhandedly dismissed any suggestion that it ought to provide States with meaningful guidance as to how they might permissibly regulate their own citizens with respect to this subject, as a number have sought to do.[2]

A State's power to repeal or amend its own laws concerning private conduct is not a marginal issue that can be confined to the specific context of PASPA and sports wagering. The Third Circuit's limitations on this Court's anti-commandeering doctrine authorize Congress to make broad incursions into the States' ability to regulate conduct within their borders not just with policies of preemption administered by the *federal* government, but by demanding the existence, enforcement, and maintenance of prohibitions under *state* law. In so holding, the Third Circuit has given

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[2] Multiple states, including California, Delaware, Illinois, Indiana, Michigan, Minnesota, Mississippi, New York, Pennsylvania, South Carolina, and Texas have recently expressed interest in having sports wagering within their borders. *See, e.g.*, Will Green, "Will New Jersey Take A Third Swing At Legal Sports Betting Via 'Friends and Family' Approach?", *Legal Sports Report* (Aug. 22, 2016) http://www.legalsportsreport.com/11157/nj-sports-betting-possiblities/.

Congress virtually unbounded discretion to dictate whether and how the States may make changes to their own state laws regulating private conduct within their borders.

The Third Circuit's *en banc* decision is transformative of the relationship between the state and federal governments, and is starkly at odds with this Court's anti-commandeering precedents. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union . . . ." *Texas* v. *White*, 74 U.S. (7 Wall.) 700, 725 (1869); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816) (describing the question of how to allocate powers between the federal and state governments as one of "great importance and delicacy"). This Court's intervention is needed to secure these fundamental underpinnings of our federalism.

I. THE THIRD CIRCUIT'S DECISION FLOUTS THIS COURT'S ANTI-COMMANDEERING PRECEDENTS, DIMINISHES THE ACCOUNTABILITY OF STATE OFFICIALS, AND INFRINGES STATES' SOVEREIGN RIGHTS

This Court's anti-commandeering precedents set forth a straightforward principle that is fundamental to our federalist system of dual sovereignty: Congress may regulate commerce directly, but may not "regulate state governments' regulation of interstate commerce." *New York* v. *United States*, 505 U.S. 144, 166 (1992); *Printz* v. *United States*, 521 U.S. 898, 924 (1997). Accordingly, Congress may not "directly . . . compel the States to require or prohibit[] certain acts."

New York, 505 U.S. at 166. Yet, as construed by the Third Circuit, PASPA requires New Jersey to maintain prohibitions its legislature has repealed and thus operates squarely against that prohibition.

Although the Third Circuit initially construed PASPA's prohibition on "authoriz[ing] by law" as reaching only acts of licensing, sponsorship, or affirmative approval of sports wagering by the State, that same court, over the dissenting vote of the author of that decision, has now construed that same prohibition also to forbid a vast array of repeals and other modifications of state-law prohibitions on sports wagering. And pursuant to that construction, the Third Circuit has approved a federal law that commands a sovereign State to continue to give effect to state-law prohibitions on certain gambling activities that its elected officials have chosen to repeal. That injunction—not the acts of New Jersey's elected officials—now dictates the contents of the laws of the State of New Jersey concerning sports wagering and thus unmistakably dictates the terms of "state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166.

The Third Circuit's conclusion that such a federal prescription of state law is constitutionally permissible is premised on a misreading of this Court's anti-commandeering precedents, scrambles lines of accountability among federal and state elected officials, and generates an unacceptable amount of uncertainty as to how States may exercise their police power. This Court should grant the petition to ensure that the anti-commandeering principle, a bedrock of federalism, does not dissolve into irrelevance.

A. The Third Circuit's Opinion Departs From This Court's Anti-Commandeering Precedents

1. This Court's seminal decision in *New York* explains that the rule barring Congress from dictating the way States regulate private conduct is grounded in the Constitution's structure of enumerated powers. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States"; conversely, "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156. Among the "attribute[s] of state sovereignty reserved by the Tenth Amendment," and possibly the most important of all, is the power of States to determine the content of their own laws. *See FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982) ("the ability of a state legislative . . . body . . . to consider and promulgate regulations of its choosing" is a "quintessential attribute of sovereignty" "central to a State's role in the federal system").

Thus it has long been accepted that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161 (quoting *Hodel* v. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). Indeed, "the Constitution never has been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions." *Id.* at 162. The Tenth Amendment thus confirms that "[t]he allocation of power contained in the Commerce Clause" while it "authorizes Congress to

regulate interstate commerce directly," "does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* at 166.

Yet, as construed by the Third Circuit, that is precisely what PASPA does—it requires States to "prohibit [certain] acts"—specifically, sports wagering in casinos and racetracks—that New Jersey no longer wishes to prohibit. Any doubt about that is resolved by the district court's injunction that prohibits New Jersey from giving effect to the 2014 Act's repeal, and unmistakably commands New Jersey to maintain in place the prohibitions that New Jersey's democratically elected officials voted to lift. The injunction makes plain that, within the field of sports wagering, New Jersey must "govern according to Congress' instructions." *New York*, 505 U.S. at 166. This Court's cases forbid that result.

2. The *en banc* Third Circuit concluded that interpreting PASPA to ban the 2014 Act's repeal "did not run afoul of anti-commandeering principles" (Pet. App. 18a) and "reject[ed]" the argument that PASPA "requir[es] the [S]tates to affirmatively keep a prohibition against sports wagering on their books." *Id.* at 23a. "PASPA does not," the court maintained, "command [S]tates to take affirmative actions, and it does not present a coercive binary choice," as the district court had suggested. *Ibid.* According to the majority, that PASPA prohibits repeals such as the 2014 Act "does not mean that [S]tates are not afforded sufficient room under PASPA to craft their own policies." *Ibid.*

a. The notion that the Third Circuit's interpretation "afford[s] sufficient room" for States to determine

how they will regulate sports wagering is both flatly incorrect and irrelevant. It is incorrect because the court held that, in addition to any type of limited legalization attempted through a state-run licensing regime, PASPA also prohibits a repeal that "selectively grants permission to certain entities to engage in sports wagering." Pet. App. 14a. What options does this leave for New Jersey to stanch black market wagering throughout the State? The Third Circuit would not say, except to suggest that a law permitting "*de minimis* wagering between friends and family would not have nearly the type of authorizing effect that we find in the 2014 Law." *Id.* at 24a. But the court did not explain why such legislation would not also "selectively grant[] permission" to engage in sports wagering. And, of course, to say that a law does not have "nearly the same authorizing effect" as the 2014 Act is not a statement that such a law would not violate PASPA. If the decision below leaves any "room" at all for the States to exercise their sovereign authority over a field of interstate commerce among private persons that Congress has chosen not to preempt, that "room" is, as Judge Vanaskie observed in dissent, "undefined." *Id.* at 36a.

In actual fact, the Third Circuit has prohibited New Jersey from repealing a state law prohibiting sports wagering and judicially decreed that that law be restored, and presumably enforced. In the end, however, whether the Third Circuit's construction of PASPA leaves States with ample "room" to define the parameters of sports wagering, or practically none at all, is irrelevant. To be sure, when federal law "leaves no 'policymaking' discretion with the States" that "worsens the intrusion upon state sovereignty."

Printz, 521 U.S. at 928. But it is ultimately no defense to an anti-commandeering violation that a law only dictates *some* aspects of the State's regulation of its citizens. To require the State to maintain ***any*** state law prohibition that it wishes to repeal is "fundamentally incompatible with our constitutional system of dual sovereignty." *Id.* at 935.

Even if PASPA gave States free rein to legalize sports wagering (in whole or in part) within their borders, except for a single federal requirement commanding States to prohibit sports wagering in casinos, the latter requirement still reduces States "to puppets of a ventriloquist Congress" as to the prohibition that the State is compelled to maintain. *Printz*, 521 U.S. at 935 (quoting *Brown* v. *EPA*, 521 F.2d 827, 839 (9th Cir. 1975)). Our system of federalism requires that the States "remain independent and autonomous within their proper sphere of authority." *Id.* Absent a valid exercise of the commerce power and the Supremacy Clause, the States' sphere of authority indisputably includes the power to define the content of their own state laws; "[i]ndeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC*, 456 U.S. at 761. This is why Congress lacks power to "directly . . . compel the States to require or prohibit [certain] acts." *New York*, 505 U.S. at 162, 166.

b. Perhaps recognizing that the "room" for policymaking its decision purported to leave was more illusory than real, the Third Circuit *en banc* majority also held that PASPA did not implicate this Court's anti-commandeering precedents "because [PASPA] does not require [S]tates to take any action" and "includes no coercive direction by the federal government." Pet.

App. 25a. But an injunction is the very definition of a "coercive direction," and the injunction here undisputedly requires New Jersey to maintain state-law prohibitions that, as far as state lawmakers are concerned, should not exist.

That PASPA does not include a requirement on States to affirmatively enact positive law does not change the analysis. As Judge Kozinski has explained, "preventing [a] [S]tate from repealing an existing law is no different from forcing it to pass a new one; in either case, the [S]tate is being forced to regulate conduct that it prefers to leave unregulated." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). That is what PASPA does: It requires New Jersey to prohibit sports wagering in casinos and racetracks even though New Jersey's elected officials have chosen not to. And that is exactly the line—whether the law "require[s] the States in their sovereign capacity to regulate their own citizens"—that this Court in *Reno* v. *Condon* said could not be crossed. *See* 528 U.S. 141, 151 (2000). Whether Congress drafts positive law for the States, or requires States to maintain existing state laws on the books, Congress is conscripting the legal apparatus of the States to implement federal policy. For more than a century, this Court has recognized that Congress lacks such power. *See Coyle* v. *Smith*, 221 U.S. 559, 564 (1911) (finding that a federal law providing that the location of Oklahoma's capital "shall not be changed" before a certain date impermissibly restricted Oklahoma's sovereignty).

3. The Third Circuit attempted to locate support for its analysis in this Court's earlier anti-commandeering decisions, concluding that PASPA was "more

like" the laws at issue in *Hodel*, *FERC*, *Reno*, and *South Carolina* v. *Baker*, 485 U.S. 511 (1988), than *New York* or *Printz*. But the court fundamentally misread those pre-*New York* decisions.

a. With respect to *Hodel* and *FERC*, the Third Circuit correctly stated that "congressional action in passing laws in otherwise pre-emptible fields has withstood attack in cases where the [S]tates were not compelled to enact laws or implement federal statutes or regulatory programs themselves." Pet. App. 19a. But the court offered no explanation of how PASPA—which compels States to maintain state laws—possibly could fall within the scope of this proposition.

Nor could it, because both *Hodel* and *FERC* depend on the explicit and unambiguous finding that the statutes at issue ultimately did not "command . . . the States to promulgate and enforce laws and regulations." *FERC*, 456 U.S. at 762. Instead the statutes at issue in *Hodel* and *FERC* were examples of "cooperative federalism" (*Hodel*, 452 U.S. at 294), in which the federal government set conditions on continued state regulation in fields that Congress otherwise had authority to preempt. *Hodel* upheld a federal statute governing surface coal mining that gave States the choice of either adopting federal performance standards as their own or deferring to direct federal regulation of the activity. *Id.* at 288. And *FERC* turned back a challenge to provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA") that similarly allowed States to continue regulating within the federally pre-emptible area of electricity and natural gas

ratemaking "on the condition that they *consider* suggested federal standards." 456 U.S. at 763.[3]

But PASPA does not remotely resemble these "cooperative federalism" programs. Quite unlike the surface mining statute in *Hodel*, PASPA creates no federally administered regulatory program to which States may elect to defer; PASPA instead requires States to maintain their own state-law prohibitions in the service of federal objectives. And PURPA, which this Court characterized as "one step beyond *Hodel*" (*FERC*, 456 U.S. at 764), did not require anything beyond "consideration" of federal regulatory suggestions. "While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," the Court observed that "there is nothing in PURPA 'directly compelling the States' to enact a legislative program." *Id.* at 762, 765; *see also id.* at 762 n.26 (acknowledging previously expressed doubt "as to whether a state agency may be ordered actually to promulgate regulations having effect as a matter of state law" (internal quotation marks omitted)). But as interpreted by the Third Circuit, PASPA does not merely require States to *consider* federal regulatory suggestions; as the injunction in this case amply illustrates, it *requires* States to maintain state-law prohibitions. *Hodel* and *FERC*

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[3] *FERC* also considered a "troublesome" (456 U.S. at 759) challenge to the federal law's requirement that "Mississippi authorities adjudicate disputes arising under the [federal] statute." *Id.* at 760. This type of requirement was upheld in *Testa* v. *Katt*, 330 U.S. 386 (1947), as a permissible directive that state adjudicatory bodies heed federal law. *See FERC*, 456 U.S. at 760–61.

provide no support for PASPA's requirement that States maintain existing laws.[4]

b. *Baker* and *Reno* likewise are inapposite. The majority viewed the statutes at issue in those cases as examples of permissible "prohibitions on state action." Pet. App. 18a. Again, though, the Third Circuit failed to explain why PASPA's prohibition on repeals of state law is similarly permissible.

Baker addressed an anti-commandeering challenge to a federal statute prohibiting the issuance of bearer bonds. 485 U.S. at 513. *Reno* concerned a challenge to a federal statute "that prohibited states from releasing information gathered by state departments of motor vehicles." Pet. App. 21a. As the Third Circuit

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[4] This Court in *FERC* acknowledged that the "choice" presented to States by PURPA was "difficult" because a State could avoid the burden of considering federal standards only by "abandoning regulation of the field altogether" when "Congress has failed to provide an alternative regulatory mechanism to police the area in the event of such state default." 456 U.S. at 766. It is doubtful that this reasoning survives *National Federation of Independent Business* v. *Sebelius (NFIB)*, 132 S. Ct. 2566, 2602 (2012) (opinion of Roberts, C.J.) ("when pressure turns into compulsion . . . legislation runs contrary to our system of federalism") (internal quotation marks omitted). But if it does, certainly presenting States with the choice of abandoning all regulation of sports wagering when Congress similarly has failed to provide an alternative regulatory framework, or maintaining prohibitions according to Congress' instructions (not merely *considering* them) is many times more "difficult"—indeed, so difficult as to be coercive in the manner *NFIB* prohibits. *See Petersburg Cellular P'ship* v. *Bd. of Supervisors*, 205 F.3d 688, 703 (4th Cir. 2000) (where "abandonment" of an entire field of regulation "is not a viable option," the choice to "either submit to federal instruction or abdicate" regulation "amounts in reality to coercion"). Of course, the Third Circuit disclaimed that PASPA presents States with such a "coercive binary choice." Pet. App. 23a.

itself said, in *Baker* the statute was upheld because it "simply subjected a State to the same legislation applicable to private parties" rather than "seek[ing] to control or influence the manner in which States regulate private parties." Pet. App. 20a–21a (quoting *Christie I*, 730 F.3d at 228). And the law in *Reno* similarly regulated States simply as "owners of data bases" (528 U.S. at 142), and "d[id] not require the States in their sovereign capacity to regulate their own citizens." Pet App. 21a (quoting *Reno*, 528 U.S. 151 (as altered in *Christie I*, 730 F.3d at 228)).

PASPA stands wholly apart from these statutes. Far beyond regulating States on the same terms as private persons participating in an area of interstate commerce, PASPA absolutely does "seek to control or influence the manner in which States regulate private parties." *Baker*, 485 U.S. at 514. The injunction in this case, by requiring the State to give effect to prohibitions the State has repealed, plainly and unequivocally does "require the States in their sovereign capacity to regulate their own citizens." *Reno*, 528 U.S. at 142. Having crossed that line, PASPA cannot be said to be "consistent with the constitutional principles enunciated in *New York* and *Printz*." *Ibid.*

B. The Third Circuit's Ruling Diminishes The Accountability Of Elected Officials

The conscription of New Jersey's legislative apparatus in service of federal ends not only disturbs our federal system, but in doing so also interferes with the accountability and responsiveness of elected representatives. As this Court wrote in *Alden* v. *Maine*, 527 U.S. 706, 751 (1999), to preserve the "principle of rep-

resentative government," "the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State," and not by federal judicial decrees. An act by the federal government that circumscribes States' powers to repeal their own laws—and worse still, that does so only vaguely, and without describing what authority, if any, state representatives have to change state law—fundamentally undermines that representative function.

As this Court stated in *New York*, "when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate," "[a]ccountability is . . . diminished." 505 U.S. at 169. PASPA does exactly that: On paper, state law bars would-be wagerers from betting on sporting events at the State's casinos and racetracks, but in reality, it is federal law (and a federal court injunction) that compels the State to maintain those unwanted state-law prohibitions. The *en banc* opinion thus not only allows Congress to impose the burdens of enforcing its policy choices onto the States, but also enables Congress to hide behind the vagueness of PASPA and thereby avoid being held accountable for its unpopular prohibitions.

If the Third Circuit's construction of "authoriz[ation] by law" in PASPA as forbidding an undefined array of repeals is upheld, it is not difficult to imagine other examples in which Congress could dictate policy outcomes in States without ever having to legislate directly. Rather than enact gun control measures of its own, for example, Congress could prohibit States from relaxing existing restrictions on the purchase of firearms by particular persons. Or, no

longer willing to expend the resources to police limitations on the usage of marijuana, Congress could repeal its own prohibitions on the use and sale of marijuana and instead prohibit States from repealing their own restrictions by enacting a PASPA-like law that prohibits States from authorizing the sale or use of marijuana "by law." Because few States would accept the choice of having totally unregulated gun possession or marijuana usage, Congress could achieve its policy objectives of stopping the spread of firearms or marijuana use even as it sets up the federal government's own exit from those fields of regulation.

Such a federally imposed disability to "regulate in accordance with the views of the local electorate," certainly "diminish[es]" accountability of state officials, and thus is deeply destructive of the States' sovereignty within our federal system. *New York*, 505 U.S. at 169. For, as this Court recognized in *FERC*, "having the power to make decisions and to set policy is what gives the State its sovereign nature." 456 U.S. at 742. Within the field of sports wagering—an area in which Congress conspicuously has declined to regulate directly—PASPA has taken away that "quintessential aspect of sovereignty." *Ibid.*

C. The Third Circuit's Construction Of PASPA Infringes State Sovereignty By Perpetuating Uncertainty As To How States May Exercise Their Sovereign Rights

PASPA's conscription of States' sovereign authority to determine how much sports wagering to permit within their borders and the conditions under which such wagering may occur shakes the foundation of the

anti-commandeering doctrine and is reason enough to grant the petition. But this Court's review is particularly important given that the Third Circuit has denied States any meaningful guidance as to what regulatory options States may exercise over the booming black market for sports wagering (in 2013, a $500 billion industry nationwide, Pet. App. 122a).

It is clear from the *en banc* opinion that States within the Third Circuit cannot enact the repeal New Jersey enacted here. Pet. App. 16a. And the Third Circuit majority's focus on the targeted nature of the 2014 Act's repeal hints that a repeal of all sports wagering regulations all over the State still might be permissible under PASPA. *But see id.* at 14a ("[O]ur discussion of partial versus total repeals is similarly unnecessary to determining the 2014 Act's legality because the question presented here . . . does not turn on the way in which the [S]tate has enacted its directive."). What is permissible is unknown, although the Third Circuit did allude to the possibility of "*de minimis* wagers between friends and family." *Id.* at 24a.

But the permissibility of the range of options lying between complete repeal (maybe still permissible) and the 2014 Act (not permissible), on the one hand; or between the 2014 Act (not permissible) and *de minimis* wagering among friends (possibly permissible), on the other hand, is anything but clear. If there is a rule to be drawn from the majority's opinion, it is the illogical proposition that Congress may command that a State adopt only extreme positions—completely unregulated wagering, or no wagering at all save for *de minimis* wagering among friends. If the State wishes to adopt any middle ground, PASPA may well prohibit

it. But States will have to litigate to find out because the majority flatly refused to provide any guidance as to how extreme a state law must be before it might conceivably become permissible. Nor does it explain what would happen if a State combined two (possibly) *permissible* actions—a complete repeal of state-law prohibitions, followed by selective enactment of restrictions—that together would cause precisely the same result as the *impermissible* 2014 Act. *See* Pet. App. 32a. That simply cannot be the rule. *See* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 U.C.L.A. L. Rev. 74, 110–13 (2015) (explaining, in the context of analyzing preemption of state medical marijuana laws, that "the outcome of the federal preemption analysis . . . cannot turn upon whether a [S]tate first repeals all its marijuana laws and then subsequently enacts a regulatory scheme or jumps straight from prohibition to regulation").

In short, the questions raised by the Third Circuit's opinion are endless and the opinion provides no path to answering them. Would a law decriminalizing office pool wagering be permitted? How about a law decriminalizing sports wagering by individuals of any age, rather than just those over 21? Or a law decriminalizing the operation of sports pools at bars, law offices, restaurants, or judicial offices instead of casinos? The only way to discover which of these middle-ground options might pass muster is apparently through trial, error, and litigation. After all, the State closely followed the directions of the Third Circuit in passing the 2014 Act, only to see the governing law change in response. Such shifting, elusive targets make it nearly impossible for state elected officials to

enact reforms or repeal laws with confidence, and are a genuine threat to state sovereignty. *Cf. NFIB*, 132 S. Ct. at 2602 (States must "voluntarily and knowingly" accept limitations on federal funds "to ensur[e] that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system") (opinion of Roberts, C.J.); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) (to preserve state sovereignty, Congress must impose any conditions on spending "with a clear voice" to ensure that "the States [may] exercise their choice knowingly, cognizant of the consequences of their participation"); *Coleman* v. *Glynn*, 983 F.2d 737, 737 (6th Cir. 1993) (Merritt, J., concurring) (recognizing federalism concerns in Spending Clause cases and stating that "[u]nless federal statutes imposing spending obligations on the [S]tates are construed so as to resolve ambiguous language in favor of the [S]tates, [they] will be unable to plan, and adopt intelligently, budgets itemizing their spending obligations"). As Judge Vanaskie put it, that is an "untenable" situation for a sovereign entity, and one that merits review by this Court. Pet. App. 36a.

CONCLUSION

The Third Circuit's latest opinion validates Judge Vanaskie's fears, expressed in dissent just two years ago in *Christie I*, that the distinction between repeals and affirmative authorizations on which *Christie I* rested was illusory. Whereas *Christie I* held that the State was free to stop prohibiting sports wagering as long as it did not affirmatively sanction it, the *en banc Christie II* decision enjoins a repeal of state-law prohibitions and thereby requires the State to continue

prohibiting sports wagering. *See* Pet. App. 46a (stating that "the distinction between repeal and authorization is unworkable" and that "[t]oday's majority opinion validates my position: PASPA leaves the States with no choice"). This Court's review is essential to ensure that the anti-commandeering doctrine continues to serve its function of preserving our federalist system. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 7, 2016

APPENDIX

APPENDIX A

PRECEDENTIAL
AMENDED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-4546, 14-4568, and 14-4569

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC; NEW JERSEY SPORTS & EXPOSITION AUTHORITY

STEPHEN M. SWEENEY, President of the New Jersey Senate; VINCENT PRIETO, Speaker of the New Jersey General Assembly (Intervenors in District Court)

Appellants in 14-4568

Governor of New Jersey; David L. Rebuck; Frank Zanzuccki, Appellants in 14-4546

New Jersey Thoroughbred Horsemen's Association, Inc., Appellant in 14-4569

On Appeal from the United States District Court
for the District of New Jersey
(District Court No.: 3-14-cv-06450)
District Judge: Honorable Michael A. Shipp

Argued on March 17, 2015 before Merits Panel
Court Ordered Rehearing En Banc
on October 14, 2015
Argued En Banc on February 17, 2016

Before: AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, KRAUSE, RESTREPO, RENDELL, and BARRY, Circuit Judges

(Opinion filed: August 9, 2016)
(Amended: August 11, 2016)

* * *

OPINION

RENDELL, Circuit Judge:

The issue presented before the en banc court is whether SB 2460, which the New Jersey Legislature enacted in 2014 to partially repeal certain prohibitions on sports gambling (the "2014 Law"), violates federal law. 2014 N.J. Sess. Law Serv. Ch. 62, codified at N.J. Stat. Ann. §§ 5:12A-7 to -9. The District Court held that the 2014 Law violates the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701-3704. A panel of this Court affirmed this ruling in a divided opinion which was subsequently vacated upon the grant of the Petition for Rehearing en banc. We now hold that the District Court correctly ruled that because PASPA, by its terms, prohibits states from authorizing by law sports gambling, and because the 2014 Law does exactly that, the 2014 Law violates federal law. We also hold that we correctly ruled in *Christie I* that PASPA does not commandeer the states in a way that runs afoul of the Constitution.

I. Background

Congress passed PASPA in 1992 to prohibit state-sanctioned sports gambling. PASPA provides:

> It shall be unlawful for—
>
> (1) a governmental entity to *sponsor, operate, advertise, promote, license, or authorize by law* or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery,

> sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702 (emphasis added). PASPA defines "governmental entity" to include states and their political subdivisions. *Id.* § 701(2). It includes a remedial provision that permits any sports league whose games are or will be the subject of sports gambling to bring an action to enjoin the gambling. *Id.* § 3703.

Congress included in PASPA exceptions for state-sponsored sports wagering in Nevada and sports lotteries in Oregon and Delaware, and also an exception for New Jersey but only if New Jersey were to enact a sports gambling scheme within one year of PASPA's enactment. *Id.* § 3704(a). New Jersey did not do so, and thus the PASPA exception expired. Notably, sports gambling was prohibited in New Jersey for many years by statute and by the New Jersey Constitution. *See, e.g.*, N.J. Const. Art. IV § VII ¶ 2; N.J. Stat. Ann. § 2C:37-2; N.J. Stat. Ann. § 2A:40-1. In 2010, however, the New Jersey Legislature held public hearings on the advisability of allowing sports gambling. These hearings included testimony that sports gambling would generate revenues for New Jersey's struggling casinos and racetracks. In 2011, the Legislature held a referendum asking New Jersey voters whether sports gambling should be permitted, and sixty-four percent voted in favor of amending the New Jersey Constitution to permit sports gambling. The constitutional amendment provided:

> It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place . . . .

N.J. Const. Art. IV, § VII, ¶ 2(D). The amendment thus permitted the New Jersey Legislature to "authorize by law" sports "wagering at casinos or gambling houses in Atlantic City," except that wagering was not permitted on New Jersey college teams or on any collegiate event occurring in New Jersey. An additional section of the amendment permitted the Legislature to "authorize by law" sports "wagering at current or former running and harness horse racetracks," subject to the same restrictions regarding New Jersey college teams and collegiate events occurring in New Jersey. *Id.* ¶ 2(F).

After voters approved the sports-wagering constitutional amendment, the New Jersey Legislature enacted the Sports Wagering Act in 2012 ("2012 Law"), which provided for regulated sports wagering at New Jersey's casinos and racetracks. N.J. Stat. Ann. §§ 5:12A-1 *et seq.* (2012). The 2012 Law established a comprehensive regulatory scheme, requiring licenses for operators and individual employees, extensive documentation, minimum cash reserves, and Division of Gaming Enforcement access to security and surveillance systems.

Five sports leagues[1] sued to enjoin the 2012 Law as violative of PASPA.[2] The New Jersey Parties did not dispute that the 2012 Law violated PASPA, but urged instead that PASPA was unconstitutional under the anti-commandeering doctrine. The District Court held that PASPA was constitutional and enjoined implementation of the 2012 Law. The New Jersey Parties appealed, and we affirmed in *National Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) (*Christie I*).

In *Christie I*, we rejected the New Jersey Parties' argument that PASPA was unconstitutional by commandeering New Jersey's legislative process. In doing so, we stated that "[n]othing in [PASPA's] words *requires* that the states keep any law in place. All that is prohibited is the issuance of gambling 'license[s]' or

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[1] The sports leagues were the National Collegiate Athletic Association, National Football League, National Basketball Association, National Hockey League, and the Office of the Commissioner of Baseball, doing business as Major League Baseball (collectively, the "Leagues").

[2] The Leagues named as defendants Christopher J. Christie, the Governor of the State of New Jersey; David L. Rebuck, the Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission. The New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") intervened as a defendant, as did Stephen M. Sweeney, President of the New Jersey Senate, and Sheila Y. Oliver, Speaker of the New Jersey General Assembly ("State Legislators"). We collectively refer to these parties as the "New Jersey Parties." In the present case, the New Jersey Parties are the same, with some exceptions. NJTHA was named as a defendant (i.e., it did not intervene), as was the New Jersey Sports and Exposition Authority; the latter is not participating in this appeal. Additionally, Vincent Prieto, not Sheila Y. Oliver, is now the Speaker of the General Assembly.

the affirmative 'authoriz[ation] *by law*' of gambling schemes." *Id.* at 232 (alterations in original). The New Jersey Parties had urged that PASPA commandeered the state because it prohibited the repeal of New Jersey's prohibitions on sports gambling; they reasoned that repealing a statute barring an activity would be equivalent to authorizing the activity, and "authorizing" was not allowed by PASPA. We rejected that argument, observing that "PASPA speaks only of 'authorizing *by law*' a sports gambling scheme," and "[w]e [did] not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Id.* (emphasis in original). We further emphasized that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." *Id.* (emphasis in original). In short, we concluded that the New Jersey Parties' argument rested on a "false equivalence between repeal and authorization." *Id.* at 233. The New Jersey Parties appealed to the Supreme Court of the United States, which denied certiorari.

Undeterred, in 2014, the Legislature passed the 2014 Law, SB 2460, which provided in part:

> [A]ny rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be

> construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events . . . .

N.J. Stat. Ann. § 5:12A-7. The 2014 Law specifically prohibited wagering on New Jersey college teams' competitions and on any collegiate competition occurring in New Jersey, and it limited sports wagering to "persons 21 years of age or older situated at such location[s]," namely casinos and racetracks. *Id.*

II. Procedural History and Parties' Arguments

The Leagues filed suit to enjoin the New Jersey Parties from giving effect to the 2014 Law. The District Court held that the 2014 Law violates PASPA, granted summary judgment in favor of the Leagues, and issued a permanent injunction against the Governor of New Jersey, the Director of the New Jersey Division of Gaming Enforcement, and the Executive Director of the New Jersey Racing Commission (collectively, the "New Jersey Enjoined Parties").[3] The District Court interpreted *Christie I* as holding that

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[3] In the District Court, the New Jersey Enjoined Parties urged that the Eleventh Amendment gave them immunity such that they could not be sued in an action challenging the 2014 Law. The District Court rejected this argument, as do we, and we note that, while the issue was briefed, the New Jersey Enjoined Parties did not press—or even mention this issue at oral argument before either the merits panel or the en banc court. They contend that, because the 2014 Law is a self-executing repeal that requires no action from them or any other state official, they are immune from suit. This argument fails. The New Jersey En-

PASPA offers two choices to states: maintaining prohibitions on sports gambling or completely repealing them. It reasoned that the 2014 Law runs afoul of PASPA because the 2014 Law is a partial repeal that necessarily results in sports wagering with the State's imprimatur. The New Jersey Parties appealed.

On appeal, the New Jersey Parties argue that the 2014 Law does not constitute an authorization in vio-

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joined Parties are subject to suit under the *Ex parte Young* exception to Eleventh Amendment immunity, which "permit[s] the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)). The contrary argument of the New Jersey Enjoined Parties relies on a false premise that execution of the 2014 Law involves no affirmative *ultra vires* act by state officials. But the 2014 Law is far from passive. As we conclude at length, the 2014 Law establishes a regulatory regime that authorizes wagering on sports in limited locations for particular persons, so it is an affirmative act by New Jersey state officials to authorize by law sports betting, in violation of PASPA. As such, implementation of the law falls squarely within the *Ex parte Young* exception to sovereign immunity because it is "simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because" it is contrary to federal law. 209 U.S. at 159. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (internal quotation marks and alterations omitted). That is precisely the situation we face in this case. We therefore need not address the unsettled question of whether an *Ex parte Young* exception must exist in the case of a truly self-executing law because the 2014 Law is not one.

lation of PASPA and it is consistent with *Christie I* because the New Jersey Legislature effected a repealer as *Christie I* specifically permitted.

The Leagues urge that the 2014 Law violates PASPA because it "authorizes by law" sports wagering and also impermissibly "licenses" the activity by confining the repeal of gambling prohibitions to licensed gambling facilities and thus, in effect, enlarging the terms of existing gaming licenses. The United States submitted an amicus brief in support of the Leagues.

A panel of this Court affirmed in a divided opinion, which was subsequently vacated. Because we, sitting en banc, essentially agree with the reasoning of the panel majority's opinion, we incorporate much of it verbatim in this opinion.

III. Analysis[4]

A. The 2014 Law Violates PASPA

As a preliminary matter, we acknowledge the 2014 Law's salutary purpose in attempting to legalize sports gambling to revive its troubled casino and racetrack industries. The New Jersey Assembly Gaming and Tourism Committee chairman stated, in regard to the 2014 Law, that "[w]e want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do something for the gaming business in the state of New Jersey, which has been under tremen-

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[4] "We review a district court's grant of summary judgment *de novo* . . . ." *Viera v. Life Ins. Co. of N. Am.*, 642 F.3d 407, 413 (3d Cir. 2011). "We review a district court's grant of a permanent injunction for abuse of discretion." *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 162 (3d Cir. 2011).

dous duress . . . ." (App. 91.) New Jersey State Senator Ray Lesniak, a sponsor of the law, has likewise stated that "[s]ports betting will be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry." (App. 94.) And New Jersey State Senator Joseph Kyrillos stated that "New Jersey's continued prohibition on sports betting at our casinos and racetracks is contrary to our interest of supporting employers that provide tens of thousands of jobs and add billions to our state's economy" and that "[s]ports betting will help set New Jersey's wagering facilities apart from the competition and strengthen Monmouth Park and our struggling casino industry." (App. 138.) PASPA has clearly stymied New Jersey's attempts to revive its casinos and racetracks and provide jobs for its workforce.

Moreover, PASPA is not without its critics, even aside from its economic impact. It has been criticized for prohibiting an activity, i.e., sports gambling, that its critics view as neither immoral nor dangerous. It has also been criticized for encouraging the spread of illegal sports gambling and for making it easier to fix games, since it precludes the transparency that accompanies legal activities. Simply put, "[w]e are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games' integrity and whether states should be permitted to license and profit from the activity—engender strong views." *Christie I*, 730 F.3d at 215. While PASPA's provisions and its reach are controversial (and, some might say, unwise), "we are not asked to judge the wisdom of PASPA" and "[i]t is not our place to usurp Congress' role simply because PASPA may have become an unpopular law." *Id.* at 215, 241. We

echo *Christie I* in noting that "New Jersey and any other state that may wish to legalize gambling on sports . . . are not left without redress. Just as PASPA once gave New Jersey preferential treatment in the context of gambling on sports, Congress may again choose to do so or . . . may choose to undo PASPA altogether." *Id.* at 240-41. Unless that happens, however, we are duty-bound to interpret the text of the law as Congress wrote it.

We now turn to the primary question before us: whether the 2014 Law violates PASPA. We hold that it does. Under PASPA, it shall be unlawful for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports gambling. 28 U.S.C. § 3702(1). We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.

First, the 2014 Law authorizes casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities. Without the 2014 Law, the sports gambling prohibitions would apply to casinos and racetracks. Appellants urge that the 2014 Law does not provide authority for sports gambling because we previously held that "[t]he right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people" and that "[w]e do not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Christie I*, 730 F.3d at 232. But this is not a situation where there are *no* laws governing sports gambling in New Jersey. Absent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos

and racetracks. Thus, the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited.

Second, the 2014 Law authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling. Under the 2014 Law, New Jersey's sports gambling prohibitions are specifically removed from casinos, gambling houses, and horse racetracks as long as the bettors are people age 21 or over, and as long as there are no bets on either New Jersey college teams or collegiate competitions occurring in New Jersey. The word "authorize" means, inter alia, "[t]o empower; to give a right or authority to act," or "[t]o permit a thing to be done in the future." Black's Law Dictionary 133 (6th ed. 1990).[5] The 2014 Law allows casinos and racetracks and their patrons to engage, under enumerated circumstances, in conduct that other businesses and their patrons cannot do. That selectiveness constitutes specific permission and empowerment.

Appellants urge that because the 2014 Law is only a "repeal" removing prohibitions against sports gambling, it is not an "affirmative authorization" under *Christie I*. To the extent that in *Christie I* we took the position that a repeal cannot constitute an authorization, we now reject that reasoning. Moreover, we do not adopt the District Court's view that the options available to a state are limited to two. Neither of these propositions were necessary to their respective

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[5] We cite the version of Black's Law Dictionary that was current in 1992, the year PASPA was passed.

rulings and were, in essence, dicta. Furthermore, our discussion of partial versus total repeals is similarly unnecessary to determining the 2014 Law's legality because the question presented here is straightforward—i.e., what does the law do—and does not turn on the way in which the state has enacted its directive.

The presence of the word "repeal" does not prevent us from examining what the provision actually does, and the Legislature's use of the term does not change that the 2014 Law selectively grants permission to certain entities to engage in sports gambling. New Jersey's sports gambling prohibitions remain, and no one may engage in such conduct except those singled out in the 2014 Law. While artfully couched in terms of a repealer, the 2014 Law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is an authorization.

Third, the exception in PASPA for New Jersey, which the State did not take advantage of before the one-year time limit expired, is remarkably similar to the 2014 Law. The exception states that PASPA does not apply to "a betting, gambling, or wagering scheme . . . conducted exclusively in casinos . . . , but only to the extent that . . . any commercial casino gaming scheme was in operation . . . throughout the 10-year period" before PASPA was enacted. 28 U.S.C. § 3704(a)(3)(B). The exception would have permitted sports gambling at New Jersey's casinos, which is just what the 2014 Law does. We can easily infer that, by explicitly excepting a scheme of sports gambling in New Jersey's casinos from PASPA's prohibitions, Congress intended that such a scheme would violate PASPA. If Congress had not perceived that sports

gambling in New Jersey's casinos would violate PASPA, then it would not have needed to insert the New Jersey exception. In other words, if sports gambling in New Jersey's casinos does not violate PASPA, then PASPA's one-year exception for New Jersey would have been superfluous. We will not read statutory provisions to be surplusage. *See Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). In order to avoid rendering the New Jersey exception surplusage, we must read the 2014 Law as authorizing a scheme that clearly violates PASPA.[6]

As support for their argument that the 2014 Law does not violate PASPA, Appellants cite the 2014 Law's construction provision, which provides that "[t]he provisions of this act . . . are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. N.J. Stat. Ann. § 5:12A-8. This conveniently mirrors PASPA's language providing that states may not "sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. 28 U.S.C. § 3702(1).

The construction provision does not save the 2014 Law. States may not use clever drafting or mandatory construction provisions to escape the supremacy of federal law. *Cf. Haywood v. Drown*, 556 U.S. 729, 742

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[6] Granted, the 2014 Law applies to horse racetracks as well as casinos, while the PASPA exception for New Jersey refers only to casinos, but that does not change the significance of the New Jersey exception because it refers to gambling in places that already allow gambling, and the racetracks fall within that rubric.

(2009) ("[T]he Supremacy Clause cannot be evaded by formalism."); *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 382-83 (1990) ("[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of" a particular word). In the same vein, the New Jersey Legislature cannot use a targeted construction provision to limit the reach of PASPA or to dictate to a court a construction that would limit that reach. The 2014 Law violates PASPA, and the construction provision cannot alter that fact.

Appellants also draw a comparison between the 2014 Law and the 2012 Law, which involved a broad regulatory scheme, as evidence that the 2014 Law does not violate PASPA. It is true that the 2014 Law does not set forth a comprehensive scheme or provide for a state regulatory role, as the 2012 Law did. However, PASPA does not limit its reach to active state involvement or extensive regulation of sports gambling. It prohibits a range of state activity, the least intrusive of which is "authorization" by law of sports gambling.

We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.[7]

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[7] Because we conclude that the 2014 Law authorizes by law sports gambling, we need not address the argument made by Appellees and Amicus that the 2014 Law also licenses sports gambling by permitting only those entities that already have gambling licenses or recently had such licenses to conduct sports gambling operations. We also reject the argument of the State Legislators and the NJTHA that, to the extent that any aspect of the 2014 Law violates PASPA, we should apply the 2014 Law's severability clause. Citing the broadly-worded severability provision of N.J. Stat. Ann. § 5:12A-9, they argue that the District

B. PASPA Does Not Impermissibly Commandeer the States

Appellants expend significant effort in this appeal revisiting our conclusion in *Christie I* that PASPA does not unconstitutionally commandeer the states. They root this effort in the District Court's erroneous conclusion that PASPA presents states with a binary choice—either maintain a complete prohibition on

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Court should have saved the 2014 Law by severing the most objectionable parts. For example, the NJTHA urges that, "if the Court . . . concludes that a state decision to prohibit persons under 21 from making sports bets is [an] authorization by law for that activity by persons over 21, the age limitation could be severed, leaving it to the sports gambling operators . . . to impose a reasonable age limit." NJTHA's Reply Br. at 23. It also argues that, "if the Court concludes that a state decision to prohibit . . . sports betting on some games is [an] authorization by law as to betting on all other games, this limitation could be severed," and that "the Court can sever the Law's provision dealing with casinos from its provision dealing with racetracks." *Id.* at 24. Lifting the age limitation, permitting betting on New Jersey schools' games, or limiting the authorization to an even narrower category of venues, however, would not alter our conclusion that the 2014 Law authorizes by law sports betting. "The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted). Because New Jersey's legislature, in both the 2012 Law and the 2014 Law, was loath to permit sports betting outside of gambling establishments, we cannot reasonably say that it would have enacted a repeal of its gambling laws without the age restriction, without the restriction on gambling on New Jersey-based college sports, and without the geographic restriction to casinos and racetracks. We thus need not speculate about other possible forms that severance might take.

sports wagering or wholly repeal state prohibitions. In *Christie I*, we engaged in a lengthy discussion to rebut Appellants' assertion that if we conclude that New Jersey's repeal of its prohibition is not permitted by PASPA, then it has unconstitutionally commandeered New Jersey. In so doing, we discussed the Supreme Court's clear case law on commandeering. Our prior conclusion that PASPA does not run afoul of anti-commandeering principles remains sound despite Appellants' attempt to call it into question using the 2014 Law as an exemplar.

1. *Anti-Commandeering Jurisprudence*

As we noted in *Christie I*, the Supreme Court's anti- commandeering principle rests on the conclusion that "Congress 'lacks the power directly to compel the States to require or prohibit' acts which Congress itself may require or prohibit." *Christie I*, 730 F.3d at 227 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)). In our prior survey of the anti-commandeering case law in *Christie I*, we grouped four commandeering cases upholding the federal laws at issue into two categories: (1) permissible regulation in a pre-emptible field, *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982); and (2) prohibitions on state action, *South Carolina v. Baker*, 485 U.S. 505 (1988) and *Reno v. Condon*, 528 U.S. 141 (2000). The Supreme Court has struck down federal laws on anti-commandeering grounds in only two cases, *New York v. United States* and *Printz v. United States*, 521 U.S. 898 (1997). We summarize our prior review below.

First, congressional action in passing laws in otherwise pre-emptible fields has withstood attack in cases where the states were not compelled to enact laws or implement federal statutes or regulatory programs themselves. In *Hodel*, the Supreme Court upheld the constitutionality of a law that imposed federal standards for coal mining. The law left states a choice. A state could "assume permanent regulatory authority over . . . surface coal mining operations" and "submit a proposed permanent program" that "demonstrate[s] that the state legislature has enacted laws implementing the environmental protection standards . . . and that the State has the administrative and technical ability to enforce the[] standards." *Hodel*, 452 U.S. at 271. However, if a state chose not to assume regulatory authority, the federal government would "administer[] the Act within that State and continue[] as such unless and until a 'state program' [wa]s approved." *Id.* at 272. As we described in *Christie I*:

> The Supreme Court upheld the provisions, noting that they neither compelled the states to adopt the federal standards, nor required them "to expend any state funds," nor coerced them into "participat[ing] in the federal regulatory program in any manner whatsoever." [*Hodel*, 452 U.S.] at 288. The Court further concluded that Congress could have chosen to completely preempt the field by simply assuming oversight of the regulations itself. *Id.* It thus held that the Tenth Amendment posed no obstacle to a system by which Congress "chose to allow the States a regulatory role." *Id.* at 290. As the Court later characterized

> *Hodel*, the scheme there did not violate the anti-commandeering principle because it "merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." *Printz v. United States*, 521 U.S. 898, 926 (1997).

Christie I, 730 F.3d at 227–28. The Supreme Court's opinion in *F.E.R.C. v. Mississippi* the following year confirmed its view that a law does not unconstitutionally commandeer the states when the law does not impose federal requirements on the states, but leaves states the choice to decline to implement federal standards. 456 U.S. 742, 767–68 (upholding a provision that required state utility companies to expend state resources to "consider" enacting federal standards, but did not require states to enact those standards).

Second, the Supreme Court has found Congress's prohibition of certain state actions to not constitute unconstitutional commandeering. In *South Carolina v. Baker*, the Court upheld federal laws that prohibited the issuance of bearer bonds, which required states to amend legislation to be in compliance. 485 U.S. at 511, 514 (1988). As we characterized this case in *Christie I*:

> The Court concluded this result did not run afoul [of] the Tenth Amendment because it did not seek to control or influence the manner in which States regulate private parties but was simply an inevitable consequence of regulating a state activity. In subsequent cases, the Court explained that the regulation in *Baker* was permissible because it simply subjected a

> State to the same legislation applicable to private parties.

Christie I, 730 F.3d at 228 (internal quotation marks and citations omitted). Later, in *Reno v. Condon*, the Court upheld the constitutionality of a law that prohibited states from releasing information gathered by state departments of motor vehicles. The Court ultimately concluded that the law at issue "d[id] not require the States in their sovereign capacity to regulate their own citizens[,] . . . d[id] not require the [State] Legislature[s] to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Reno*, 528 U.S. at 151 (as altered in *Christie I*, 730 F.3d at 228).

As noted above, the Supreme Court has invalidated laws on anti-commandeering grounds on only two occasions. In *New York*, the Supreme Court struck down a "take-title" provision whereby states were required to take title to radioactive waste by a specific date, at the waste generator's request, if they did not adopt a federal program. As we stated in *Christie I*, the provision "compel[led] the states to either enact a regulatory program, or expend resources in taking title to the waste." *Christie I*, 730 F.3d at 229. The Supreme Court ultimately concluded in *New York* that the take-title provision "crossed the line distinguishing encouragement from coercion." 505 U.S. at 175. Similarly in *Printz v. United States*, the Supreme Court concluded that Congress "may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program." 521 U.S. at 935 (finding a federal law requiring state

officers to conduct background checks on prospective gun owners to commandeer the states in violation of the Tenth Amendment).

2. *PASPA Does Not Violate Anti-Commandeering Principles*

We continue to view PASPA's prohibition as more akin to those laws upheld *in Hodel, F.E.R.C., Baker*, and *Reno*, and distinguishable from those struck down by the Supreme Court in *New York* and *Printz*. Our articulation of the way in which PASPA does not violate anti-commandeering principles warrants refinement, however, given the way in which the 2014 Law attempted to skirt PASPA and the thrust of Appellants' arguments in this appeal.

In an attempt to reopen the anti-commandeering question we previously decided, Appellants creatively rely on certain language that was used in *Christie I*. In pressing for a declaration that PASPA unconstitutionally commandeered the states in *Christie I*, Appellants characterized PASPA as requiring the states to affirmatively keep a prohibition against sports wagering on their books, lest they be found to have authorized sports gambling by law by repealing the prohibition. In response, we opined that Appellants' position "rest[ed] on a false equivalence between repeal and authorization," implying that a repeal is not an authorization. 730 F.3d at 233. Before us now Appellants urge that "[t]his Court held [in *Christie I*] that PASPA is constitutional *precisely because* it permits States to elect *not to prohibit* sports wagering, even if *affirmatively authorizing* it would be unlawful." Appellants' Br. 22 (emphasis in original). Appellants are saying, in effect, "We told you so"—if the legislature

cannot repeal New Jersey's prohibition as it attempted to do in the 2014 Law, then it is required to affirmatively keep the prohibition on the books, and PASPA unconstitutionally commandeers the states. We reject this argument.

That said, we view our discussion in *Christie I* regarding the relationship between a "repeal" and an "authorization" to have been too facile. While we considered whether repeal and authorization are interchangeable, our decision did not rest on that discussion. Today, we choose to excise that discussion from our prior opinion as unnecessary dicta. To be clear, a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, "authorization" under PASPA. However, our determination that such a selective repeal of certain prohibitions amounts to authorization under PASPA does not mean that states are not afforded sufficient room under PASPA to craft their own policies.

Appellants urge that our conclusion in *Christie I* that PASPA does not unconstitutionally commandeer the states rested on our view that PASPA allows states to "choos[e] among many different potential policies on sports wagering that do not include licensing or affirmative authorization by the State." Appellants' Br. 29. This is correct. PASPA does not command states to take affirmative actions, and it does not present a coercive binary choice. Our reasoning in *Christie I* that PASPA does not commandeer the states remains unshaken.

Appellants characterize the 2014 Law as a lawful exercise in the space PASPA affords states to create their own policy. They argue that without options beyond a complete repeal or a complete ban on sports wagering, such as the partial repeal New Jersey pursued, PASPA runs afoul of anti- commandeering principles. This argument sweeps too broadly. That a specific partial repeal which New Jersey chose to pursue in its 2014 Law is not valid under PASPA does not preclude the possibility that other options may pass muster. The issue of the extent to which a given repeal would constitute an authorization, in a vacuum, is not before us, as it was not specifically before us in *Christie I*. However, as the Leagues noted at oral argument before the en banc court, not all partial repeals are created equal. For instance, a state's partial repeal of a sports wagering ban to allow *de minimis* wagers between friends and family would not have nearly the type of authorizing effect that we find in the 2014 Law. We need not, however, articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, if indeed such a line could be drawn. It is sufficient to conclude that the 2014 Law overstepped it.

Appellants seize on the District Court's erroneous interpretation of *Christie I*'s anti-commandeering analysis—namely, that PASPA presents states with a strict binary choice between total repeal and keeping a complete ban on their books—to once again urge that if PASPA commands such a choice, then it is comparable to the challenged law in *New York*. First, unlike the take-title provision included in the statute at issue in *New York*, PASPA's text does not present

states with a coercive choice to adopt a federal program. To interpret PASPA to require such a coercive choice is to read something into the statute that simply is not there.

Second, PASPA is further distinguishable from the law at issue in *New York* because it does not require states to take any action. In *New York*, the Supreme Court held that a federal law that required states to enact a federal regulatory program or take title to radioactive waste at the behest of generators "crossed the line distinguishing encouragement from coercion." 505 U.S. at 175. Unlike the law at issue in *New York*, PASPA includes no coercive direction by the federal government. As we previously concluded in *Christie I*, PASPA does not command states to take any affirmative steps:

> PASPA does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law. They are not even required, like the states were in *F.E.R.C.*, to expend resources considering federal regulatory regimes, let alone to adopt them. Simply put, we discern in PASPA no directives requiring the States to address particular problems and no commands to the States' officers to administer or enforce a federal regulatory program.

730 F.3d at 231 (internal quotation marks and alterations omitted) (emphasis in original). Put simply, PASPA does not impose a coercive either-or requirement or affirmative command.

We will not allow Appellants to bootstrap already decided questions of PASPA's constitutionality onto our determination that the 2014 Law violates PASPA. We reject the notion that PASPA presents states with a coercive binary choice or affirmative command and conclude, as we did in *Christie I*, that it does not unconstitutionally commandeer the states.

IV. Conclusion

The 2014 Law violates PASPA because it authorizes by law sports gambling. We continue to find PASPA constitutional. We will affirm.

FUENTES *joined by* RESTREPO, Circuit Judges, dissenting:

In November 2011, the question of whether to allow sports betting in New Jersey went before the electorate. By a 2-1 margin, New Jersey voters passed a referendum to amend the New Jersey Constitution to allow the New Jersey Legislature to "authorize by law" sports betting.[1] Accordingly, the Legislature enacted the 2012 Sports Wagering Act ("2012 Law"). The Sports Leagues challenged this Law, claiming that it violated the Professional and Amateur Sports Protection Act's ("PASPA") prohibition on states "authoriz[ing] by law" sports betting.[2] In *Christie I*, we agreed with the Sports Leagues and held that the 2012 Law violated and thus was preempted by PASPA. We explained, however, that New Jersey was free to repeal the sports betting prohibitions it already had in place. We rejected the argument that a repeal of prohibitions on sports betting was equivalent to authorizing by law sports betting. When the matter was brought to the Supreme Court, the Solicitor General echoed that same sentiment, stating that, "PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part."[3]

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[1] N.J. Const. art. IV, § 7, ¶ 2(D).

[2] *See* 28 U.S.C. § 3702(1).

[3] Br. for the United States in Opp'n at 11, *Christie v. Nat'l Collegiate Athletic Ass'n*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014).

So New Jersey did just that. In 2014, the New Jersey Legislature repealed certain sports betting prohibitions at casinos and gambling houses in Atlantic City and at horse racetracks in the State ("2014 Repeal"). In addition to repealing the 2012 Law in full, the 2014 Repeal stripped New Jersey of *any* involvement in sports betting, regulatory or otherwise. In essence, the 2014 Repeal rendered previous prohibitions on sports betting non-existent.

But the majority today concludes that the New Jersey Legislature's efforts to satisfy its constituents while adhering to our decision in *Christie I* are still in violation of PASPA. According to the majority, the "selective" nature of the 2014 Repeal *amounts to* "authorizing by law" a sports wagering scheme. That is, because the State retained certain restrictions on sports betting, the majority *infers* the authorization by law. I cannot agree with this interpretation of PASPA.

PASPA restricts the states in six ways – a state cannot "sponsor, operate, advertise, promote, license, or *authorize by law* or compact" sports betting.[4] The only one of these six restrictions that includes "by law" is "authorize." None of the other restrictions say anything about *how* the states are restricted. Thus, I believe that Congress gave this restriction a special meaning—that a state's "authoriz[ation] by law" of sports betting cannot merely be inferred, but rather requires a specific legislative enactment that affirmatively allows the people of the state to bet on sports. Any other interpretation would be reading the phrase "by law" out of the statute.

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[4] 28 U.S.C. § 3702(1) (emphasis added).

Indeed, we stated exactly this in *Christie I*—that all PASPA prohibits is "the affirmative 'authoriz[ation] *by law*' of gambling schemes."[5] Thus, we explained, nothing prevented New Jersey from repealing its sports betting prohibitions, since, "in reality, the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law."[6] As we noted, "that the Legislature needed to enact the [2012 Law] itself belies any contention that the mere repeal of New Jersey's ban on sports gambling was sufficient to 'authorize [it] by law.'"[7] The Legislature itself "saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering—the [2012 Law] was required."[8] In short, we explained that there was a false equivalence between repeal and authorization.

With the 2014 Repeal, the New Jersey Legislature did what it thought it was permitted to do under our reading of PASPA in *Christie I*. The majority, however, maintains that the 2014 Repeal "authorizes" sports wagering at casinos, gambling houses, and horse racetracks simply because other sports betting

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[5] *Christie I*, 730 F.3d at 232 (alteration in original)

[6] *Id.*

[7] *Id.* (alteration in original).

[8] *Id.*

prohibitions remain in place.[9] According to the majority, "[a]bsent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks," and thus "the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited."[10] But I believe the majority is mistaken as to the impact of a partial repeal.

A repeal is defined as an "abrogation of an existing law by legislative act."[11] When a statute is repealed, "the repealed statute, in regard to its operative effect, is considered as if it had never existed."[12] If a repealed statute is treated as if it never existed, a partially repealed statute is treated as if the repealed sections never existed.[13] The 2014 Repeal, then, simply returns New Jersey to the state it was in before it first

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[9] I refer to the repeal of prohibitions as applying to casinos, gambling houses, and horse racetracks, with the understanding that the repeal applies to casinos and gambling houses in Atlantic City and horse racetracks in New Jersey for those over 21 not betting on New Jersey collegiate teams or any collegiate competition occurring in New Jersey.

[10] Maj. Op. 17.

[11] Black's Law Dictionary 1325 (8th ed. 2007).

[12] 73 Am. Jur. 2d Statutes § 264.

[13] *See, e.g.*, *Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("[W]hen an act of the legislature is repealed, it must be considered . . . as if it never existed."); *Anderson v. USAir, Inc.*, 818 F.2d 49, 55 (D.C. Cir. 1987) ("Common sense dictates that repeal means a deletion. This court would engage in pure speculation were it to hold otherwise."); *Kemp by Wright v. State, Cty. of Burlington*, 687 A.2d 715, 723 (N.J. 1997) ("In this State it is the general rule that where a statute is repealed and there is no saving[s] clause or a general statute limiting the effect of the re-

enacted those prohibitions on sports gambling. In other words, after the repeal, it is as if New Jersey *never* prohibited sports wagering at casinos, gambling houses, and horse racetracks. Therefore, with respect to those locations, there are no laws governing sports wagering. Contrary to the majority's position, the permission to engage in such an activity is not affirmatively granted *by virtue of* it being prohibited elsewhere.

To bolster its position, the majority rejects our reasoning in *Christie I*, stating that "[t]o the extent that in *Christie I* we took the position that a repeal cannot constitute an authorization, we now reject that reasoning."[14] I continue to maintain, however, that the 2014 Repeal *is not* an affirmative authorization by law. It is merely a repeal – it does not, and cannot, authorize by law anything.

In my view, the majority's position that the 2014 Repeal "selectively grants permission to certain entities to engage in sports gambling"[15] is simply incorrect. There is no explicit grant of permission in the 2014 Repeal for any person or entity to engage in sports gambling. Rather, the 2014 Repeal is a self-executing deregulatory measure that repeals existing prohibitions and regulations for sports betting and re-

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peal, the repealed statute, in regard to its operative effect, is considered as though it had never existed, except as to matters and transactions passed and closed.").

[14] Maj. Op. 18.

[15] *Id.*

quires the State to abdicate *any* control or involvement in sports betting.[16] The majority fails to explain why a partial repeal is equivalent to a grant of permission (by law) to engage in sports betting.

Suppose the State did exactly what the majority suggests it could have done: repeal completely its sports betting prohibitions. In that circumstance, sports betting could occur anywhere in the State and there would be no restrictions as to age, location, or whether a bettor could wager on games involving local teams. Would the State violate PASPA if it later enacted limited restrictions regarding age requirements and places where wagering could occur? Surely no conceivable reading of PASPA would preclude a state from *restricting* sports wagering in this scenario. Yet the 2014 Repeal comes to the same result.

The majority also fails to illustrate how the 2014 Repeal results in sports wagering *pursuant to state law* when there is effectively no law in place as to several locations, no scheme created, and no state involvement. A careful comparison with the 2012 Law is instructive. The 2012 Law lifted New Jersey's ban on sports wagering and created a licensing scheme for sports wagering pools at casinos and racetracks in the State. This comprehensive regime required close State supervision and regulation of those sports wagering pools. For instance, the 2012 Law required any entity that wished to operate a "sports pool lounge" to acquire a "sports pool license." To do so, a prospective

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[16] For example, under the 2014 Repeal, "[the Division of Gaming Enforcement ("DGE")] now considers sports wagering to be 'non-gambling activity' . . . that is beyond DGE's control and outside of DGE's regulatory authority." App. 416.

operator was required to pay a $50,000 application fee, secure Division of Gaming Enforcement ("DGE") approval of all internal controls, and ensure that any of its employees who were to be directly involved in sports wagering obtained individual licenses from the DGE and the Casino Control Commission ("CCC"). In addition, the betting regime required entities to, among other things, submit extensive documentation to the DGE, adopt new "house" rules subject to DGE approval, and conform to DGE standards. This, of course, violated PASPA in the most basic way: New Jersey developed an intricate scheme that both "authorize[d] *by law*" and "license[d]" sports gambling. The 2014 Repeal eliminated this entire scheme. Moreover, all state agencies with jurisdiction over state casinos and racetracks, such as the DGE and the CCC, were stripped of any sports betting oversight.

The majority likewise falters when it analogizes the 2014 Repeal to the exception Congress originally offered to New Jersey in 1992. The exception stated that PASPA did not apply to "a betting, gambling, or wagering scheme . . . conducted exclusively in casinos[,] . . . but only to the extent that . . . any commercial casino gaming scheme was in operation . . . throughout the 10-year period" before PASPA was enacted.[17] Setting aside the most obvious distinction between the 2014 Repeal and the 1992 exception—that it contemplated a *scheme* that the 2014 Repeal does not authorize—the majority misses the mark when it states: "If Congress had not perceived that sports gambling in New Jersey's casinos would violate PASPA, then it would not have needed to insert the

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[17] 28 U.S.C. § 3704(a)(3)(B).

New Jersey exception."[18] Congress did not, however, perceive, or intend for, private sports wagering in casinos to violate PASPA. Instead, Congress prohibited sports wagering undertaken pursuant to state law. That the 2014 Repeal might bring about an increase in the amount of private, legal sports wagering in New Jersey is of no moment, and the majority's reliance on such a possibility is misplaced. The majority is also wrong in a more fundamental way. The *exception* Congress offered to New Jersey was exactly that: an exception to the ordinary prohibitions of PASPA. That is to say, with this exception, New Jersey could have "sponsor[ed], operate[d], advertise[d], promote[d], license[d], or authorize[d] by law or compact" sports wagering. Under the 2014 Repeal, of course, New Jersey cannot and does not aim to do any of these things.

Because I do not see how a partial repeal of prohibitions is tantamount to authorizing by law a sports wagering scheme in violation of PASPA, I respectfully dissent.

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[18] Maj. Op. 19.

VANASKIE, Circuit Judge, dissenting.

While Congress "has the authority under the Constitution to pass laws requiring or prohibiting certain acts, *it lacks the power directly to compel the States to require or prohibit those acts.*" *New York v. United States*, 505 U.S. 144, 166 (1992) (emphasis added). Concluding that the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq.*, was a congressional command that States must prohibit wagering on sporting events because it forbids the States from "authoriz[ing] by law" such activity, I dissented from the holding in *Christie I* that PASPA was a valid exercise of congressional authority. *National Collegiate Athletic Ass'n v. Governor of New Jersey (Christie I)*, 730 F.3d 208, 241–51 (3d Cir. 2013) (Vanaskie, J., dissenting). My colleagues in the majority in *Christie I* disagreed with my conclusion because they believed that States had the option of repealing existing bans on sports betting. *Id.* at 232. In upholding PASPA, *Christie I* rejected New Jersey's argument that a repeal of its ban on sports betting would be viewed as effectively "authoriz[ing] by law" this activity. *Christie I* declared that New Jersey's "attempt to read into PASPA a requirement that the states must affirmatively keep a ban on sports gambling in their books rests on a false equivalence between repeal and authorization." *Id.* at 233. I viewed that "false equivalence" assertion with considerable skepticism. *Id.* at 247 n. 5 ("[I]t certainly is open to debate whether a state's repeal of a ban on sports gambling would be akin to that state's 'authorizing' gambling on sporting events . . . ."). My skepticism is validated by today's majority opinion. The majority

dodges the inevitable conclusion that PASPA conscripts the States to prohibit wagering on sports by suggesting that some partial repeal of the ban on sports gambling would not be tantamount to authorization of gambling.

Implicit in today's majority opinion and *Christie I* is the premise that Congress lacks the authority to decree that States must prohibit sports wagering, and so both majorities find some undefined room for States to enact partial repeals of existing bans on sports gambling. While the author of *Christie I* finds that New Jersey's partial repeal at issue here is not the equivalent of authorizing by law wagering on sporting events, today's majority concludes otherwise. This shifting line approach to a State's exercise of its sovereign authority is untenable. The bedrock principle of federalism that Congress may not compel the States to require or prohibit certain activities cannot be evaded by the false assertion that PASPA affords the States some undefined options when it comes to sports wagering. Because I believe that PASPA was intended to compel the States to prohibit wagering on sporting events, it cannot survive constitutional scrutiny. Accordingly, as I did in *Christie I*, I dissent.

I.

According to the majority, "a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA." Maj. Op., at 28. The majority also claims "a state's partial repeal of a sports wagering ban to allow *de minimis* wagers between friends and family would not have nearly the type of

authorizing effect that we find in the 2014 Law." *Id.* at 29. Thus, according to the majority, the 2014 Law is a partial repeal that is foreclosed by PASPA, but "other options may pass muster" because "not all partial repeals are created equal." *Id.*

Noticeably, the majority does not explain why all partial repeals are not created equal or explain what distinguishes the 2014 Law from those partial repeals that pass muster. To further complicate matters, the majority continues to rely on *Christie I*, which did "not read PASPA to prohibit New Jersey from repealing its ban on sports wagering" and informed New Jersey that "[n]othing in [PASPA's] words *requires* that the states keep any law in place." 730 F.3d at 232.

A.

Christie I "[r]ecogniz[ed] the importance of the affirmative/negative command distinction," and "agree[d] with [New Jersey] that the affirmative act requirement, if not properly applied, may permit Congress to 'accomplish exactly what the commandeering doctrine prohibits' by stopping the states from 'repealing an existing law.'" 730 F.3d at 232 (quoting *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring)). *Christie I*, however, discounted concerns regarding PASPA's affirmative act requirement because *Christie I* "d[id] not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." *Id.* According to *Christie I*, PASPA is constitutional because "[n]othing in [PASPA's] words *requires* that the states keep any law in place." *Id.* This conclusion formed the premise for the conclusion in *Christie I* that PASPA passed constitutional muster.

Remarkably, the majority chooses to "excise that discussion from our prior opinion as unnecessary dicta." Maj. Op., at 28. This cannot be the case, however, because that discussion was the cornerstone of the holding in *Christie I*. *See In re McDonald*, 205 F.3d 606, 612 (3d Cir. 2000) ("Chief Judge Posner has aptly defined dictum as 'a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it.'" (quoting *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986))).

Indeed, to rationalize its conclusion in *Christie I*, the *Christie I* majority had to expressly reject the notion that when a state "choose[s] to repeal an affirmative prohibition of sports gambling, that is the same as 'authorizing' that activity, and therefore PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it." 730 F.3d at 232. This aspect of *Christie I* was not peripheral to the ultimate holding because *Christie I* specifically "agree[d] with [New Jersey] that the affirmative act requirement, if not properly applied, may permit Congress to 'accomplish exactly what the commandeering doctrine prohibits' by stopping the states from 'repealing an existing law.'" *Id.* (quoting *Conant*, 309 F.3d at 646 (Kozinski, J., concurring)). Thus, to resolve the issue before it, *Christie I* necessarily had to give this issue the "full and careful consideration of the court." *In re McDonald*, 205 F.3d at 612 (quoting *Sarnoff*, 798 F.2d at 1084).

In giving the issue its full and careful consideration, *Christie I* explained that the notion that a "repeal" could be the same as an "authorization" was "problematic in numerous respects." 730 F.3d at 232; *see also id.* ("Most basically, it ignores that PASPA speaks only of 'authorizing by law' a sports gambling scheme."). *Christie I* did "not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Id.* *Christie I* recognized a distinction between affirmative commands for actions and prohibitions, and explained that there was "a false equivalence between repeal and authorization." *Id.* at 233. Thus, as a matter of statutory construction, and to avoid "a series of constitutional problems," *Christie I* specifically held that if the Court did not distinguish between "repeals" (affirmative commands) and "authorizations" (affirmative prohibitions), the Court would "read[] the term 'by law' out of [PASPA]." *Id.* at 233.

I dissented from that opinion because "any distinction between a federal directive that commands states to take affirmative action and one that prohibits states from exercising their sovereignty is illusory." 730 F.3d at 245 (Vanaskie, J., concurring in part and dissenting in part). The decision to base *Christie I* on a distinction between affirmative commands for action and affirmative prohibitions was "untenable," because "affirmative commands to engage in certain conduct can be rephrased as a prohibition against not engaging in that conduct." *Id.* As I explained, basing *Christie I* on such an illusory distinction raises constitutional concerns because "[a]n interpretation of federalism principles that permits

congressional negative commands to state governments will eviscerate the constitutional lines drawn" by the Supreme Court. *Id.*

B.

After *Christie I*, a state like New Jersey *at least* had the choice to either "repeal its sports wagering ban," or, "[o]n the other hand . . . keep a complete ban on sports gambling." *Id.* at 233 (majority opinion). The *Christie I* majority found that this choice was not too coercive because it left "much room for the states to make their own policy" and left it to a State "to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be." *Id.*

Today's majority makes it clear that PASPA does not leave a State "much room" at all. Indeed, it is evident that States must leave gambling prohibitions on the books to regulate their citizens. A review of the four Supreme Court anti-commandeering cases referenced by the majority is illuminating.

1.

The first two anti-commandeering cases that the majority reviews are *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982). As the majority points out, these cases address "permissible regulation in a pre-emptible field." Maj. Op., at 23. In analyzing these cases, however, the majority overlooks the main rule announced by the Supreme Court in situations where there is an exercise of legislative authority under the Commerce Clause or where Congress preempts an area with federal legislation within its legislative power. In such situations, States

have a choice: they may either comply with the federal legislation *or the Federal Government will carry the legislation into effect.*

This rule was announced in *Hodel*, where the Supreme Court explained that "[i]f a State does not wish to . . . compl[y] with the Act and implementing regulations, *the full regulatory burden will be borne by the Federal Government.*" 452 U.S. at 288 (emphasis added). The same theme repeated itself in *F.E.R.C.*, as the Supreme Court focused on "*the choice put to the States*—that of either abandoning regulation of the field altogether or considering the federal standards." 456 U.S. at 766 (emphasis added). In both cases, the Supreme Court was clear that there must be some choice for the states to make because without it "the accountability of both state and federal officials is diminished." *New York v. United States*, 505 U.S. 144, 168 (1992).

Indeed, in *New York v. United States*, the Court explained that a State's view on legislation "can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case . . . it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* at 168. The Supreme Court reiterated this point *Printz v. United States*, explaining that, "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." 521 U.S. 898, 930 (1997). Thus, States must be given a choice because the Supreme Court is concerned that "it may be state officials who will bear the brunt of

public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 169.

As the majority explains, while "PASPA's provisions and its reach are controversial (and, some might say, unwise) . . . . we are duty-bound to interpret the text of the law as Congress wrote it." Maj. Op., at 16. Because the majority has excised the distinction between a repeal and an authorization, the majority makes it clear that under PASPA as written, no repeal of any kind will evade the command that no State "shall . . . authorize by law" sports gambling. 28 U.S.C. § 3702. In the face of such a congressional directive, "no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz*, 521 U.S. at 935.

2.

This leads to the other two anti-commandeering cases reviewed by the majority: *South Carolina v. Baker*, 485 U.S. 505 (1988), and *Reno v. Condon*, 528 U.S. 141 (2000). The majority explains that these cases address permissible "prohibitions on state action." Maj. Op., at 23. Again, however, the majority seems to overlook the animating factor for each of these opinions. In both *Baker* and *Reno* the Supreme Court explained that permissible prohibitions regulated *State activities*. The Supreme Court has never sanctioned statutes or regulations that sought to control or influence *the manner in which States regulate private parties*.

For example, in *Baker*, the Supreme Court reviewed a challenge to the Internal Revenue Code's enactment of § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, which prohibited States from issuing unregistered bearer bonds. Notably, when reviewing the case, the Court specifically found that it did not need to address "the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests" because the Court found that the commandeering concerns "in *FERC* [were] inapplicable to § 310." *Baker*, 485 U.S. at 513. Importantly, the Court distinguished § 310 from the statute in *F.E.R.C.* because the Court found that "Section 310 regulates state activities; it does not, as did the statute in *FERC*, seek to control or influence the manner in which States regulate private parties." *Id.* at 514. Similarly, in *Reno*, the Court addressed a statute that did not require (1) "the States in their sovereign capacity to regulate their own citizens," (2) "the . . . Legislature to enact any laws or regulations," or (3) "state officials to assist in the enforcement of federal statutes regulating private individuals." 528 U.S. at 151. It was only on these bases that the Supreme Court found the statute at issue in Reno was "consistent with the constitutional principles enunciated in *New York* and *Printz*." *Id.*

Unlike the statutes at issue in Baker and Reno, however, PASPA seeks to control and influence the *manner* in which States regulate private parties. Through PASPA, Congress unambiguously commands that "[i]t shall be unlawful for . . . a governmental entity to . . . authorize by law" sports gambling. 28 U.S.C. § 3702. By issuing this command,

Congress has set an impermissible "mandatory agenda to be considered in all events by state legislative or administrative decisionmakers." *F.E.R.C.*, 45 U.S. at 769.

3.

The logical extension of the majority is that PASPA prevents States from passing *any* laws to repeal existing gambling laws. As the majority correctly notes, "[t]he word 'authorize' means, inter alia, '[t]o empower; to give a right or authority to act,' or '[t]o permit a thing to be done in the future.'" Maj. Op., at 17 (quoting Black's Law Dictionary 133 (6th Ed. 1990)) (footnote omitted). Because authorization includes permitting a thing to be done, it follows that PASPA also prevents state officials from stopping enforcement of existing gambling laws. States *must* regulate conduct prioritized by Congress. *Cf. Conant*, 309 F.3d at 646 (Kozinski, J., concurring) ("[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated.").

It is true that civil actions to enjoin a violation of PASPA "may be commenced in an appropriate district court of the United States by the Attorney General of the United States." 28 U.S.C. § 3703. But it can hardly be said that the United States Attorney General bears the full regulatory burden because, through

PASPA, Congress effectively commands the States to maintain and enforce existing gambling prohibitions.[1]

PASPA is a statute that directs States to maintain gambling laws by dictating the manner in which States must enforce a federal law. The Supreme Court has never considered Congress' legislative power to be so expansive. *See Prigg v. Com. of Pennsylvania*, 41 U.S. 539, 541 (1842) ("It might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution"); *F.E.R.C.*, 456 U.S. at 761–62 ("[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations ") (citing *E.P.A. v. Brown*, 431 U.S. 99 (1977)); *New York*, 505 U.S. at 178 ("Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S Ct. 2566, 2602 (2012) (plurality opinion) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." (quoting *New York*, 505 U.S. at 162)).

II.

It is now apparent that *Christie I* was incorrect in finding that "*nothing* in [PASPA's] words *requires* that the states keep *any* law in place." 730 F.3d at 232

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[1] A refusal to enforce existing laws would be the same as a repeal of existing laws: the States would be authorizing sports wagering.

(first and third emphasis added). With respect to the doctrinal anchors of *Christie I*, the cornerstone of its holding has been eroded by the majority, which has excised *Christie I*'s discussion regarding "a false equivalence between repeal and an authorization." *Id.* at 233. Notably, that discussion was included in *Christie I* to avoid "a series of constitutional problems." *Id.* Today's majority makes it clear that passing a law so that there is no law in place governing sports wagering is the same as authorizing it by law. *See* Maj. Op., at 17 ("The word 'authorize' means, inter alia, '[t]o empower; to give a right or authority to act,' or '[t]o permit a thing to be done in the future.'") (citation and footnote omitted).

I dissented in *Christie I* because the distinction between repeal and authorization is unworkable. Today's majority opinion validates my position: PASPA leaves the States with no choice. While *Christie I* at least gave the States the option of repealing, in whole or *in part*, existing bans on gambling on sporting events, today's decision tells the States that they must maintain an anti-sports wagering scheme. The anti-commandeering doctrine, essential to protect State sovereignty, prohibits Congress from compelling States to prohibit such private activity. Accordingly, I dissent.

APPENDIX B

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-4546, 14-4568, and 14-4569

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC; NEW JERSEY SPORTS & EXPOSITION AUTHORITY

On Appeal from the United States District Court for the District of New Jersey
(District Court No.: 3-14-cv-06450)
District Judge: Honorable Michael A. Shipp

Before: AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, KRAUSE, RESTREPO, RENDELL, and BARRY, Circuit Judges

ORDER AMENDING OPINION

The opinion issued on August 9, 2016 is hereby amended as the Honorable L. Felipe Restrepo joined in the dissenting opinion filed by the Honorable Julio M. Fuentes.

A revised opinion will be entered on the docket reflecting this change. This amendment does not affect the original filing date of the judgment.

For the Court,

s/ _____

Marcia M. Waldron, Clerk
Date: August 11, 2016
tmm/cc: all counsel of record

APPENDIX C

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-4546, 14-4568, and 14-4569

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; NEW JERSEY SPORT & EXPOSITION AUTHORITY

STEPHEN M. SWEENEY, President of the New Jersey Senate; VINCENT PRIETO, Speaker of the New Jersey General Assembly (Intervenors in District Court),

Appellants in 14-4568

Governor of New Jersey; David L. Rebuck; Frank Zanzuccki,

Appellants in 14-4546

New Jersey Thoroughbred Horsemen's Association, Inc.,

Appellant in 14-4569

On Appeal from the United States District Court
for the District of New Jersey
(District Court No.: 3-14-cv-06450)
District Judge: Honorable Michael A. Shipp

Argued on March 17, 2015

Before: RENDELL, FUENTES and BARRY, Circuit Judges (Opinion filed: August 25, 2015)

* * *

(Opinion filed: August 9, 2016)
(Amended: August 11, 2016)

OPINION

RENDELL, Circuit Judge:

The issue presented in this appeal is whether SB 2460, which the New Jersey Legislature enacted in 2014 (the "2014 Law") to partially repeal certain

prohibitions on sports gambling, violates federal law. 2014 N.J. Sess. Law Serv. Ch. 62, codified at N.J. Stat. Ann. §§ 5:12A-7 to -9. The District Court held that the 2014 Law violates the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701-3704. We will affirm. PASPA, by its terms, prohibits states from authorizing by law sports gambling, and the 2014 Law does exactly that.

I. Background

Congress passed PASPA in 1992 to prohibit state-sanctioned sports gambling. PASPA provides:

> It shall be unlawful for—
>
> (1) a governmental entity to *sponsor, operate, advertise, promote, license, or authorize by law* or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702 (emphasis added). PASPA defines "governmental entity" to include states and their political subdivisions. 28 U.S.C. § 3701(2). PASPA includes a remedial provision that permits any sports league whose games are or will be the subject of sports gambling to bring an action to enjoin the gambling. 28 U.S.C. § 3703.

Congress included in PASPA exceptions for state-sponsored sports wagering in Nevada and sports lotteries in Oregon and Delaware, and also an exception for New Jersey but only if New Jersey were to enact a sports gambling scheme within one year of PASPA's enactment. 28 U.S.C. § 3704(a). New Jersey did not do so and, thus, the PASPA exception expired. Notably, sports gambling was prohibited in New Jersey for many years by statute and by the New Jersey Constitution. *See, e.g.*, N.J. Const. Art. IV § VII ¶ 2; N.J. Stat. Ann. § 2C:37-2; N.J. Stat. Ann. § 2A:40-1. In 2010, however, the New Jersey Legislature held public hearings on the advisability of allowing sports gambling. These hearings included testimony that sports gambling would generate revenues for New Jersey's struggling casinos and racetracks. In 2011, the Legislature held a referendum asking New Jersey voters whether sports gambling should be permitted, and sixty-four percent voted in favor of amending the New Jersey Constitution to permit sports gambling. The constitutional amendment provided:

> It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place . . . .

N.J. Const. Art. IV, § VII, ¶ 2(D). The amendment thus permitted the New Jersey Legislature to "au-

thorize by law" sports wagering at "casinos or gambling houses in Atlantic City," except that wagering was not permitted on New Jersey college teams or on any collegiate event occurring in New Jersey. An additional section of the amendment permitted the Legislature to "authorize by law" sports wagering at "current or former running and harness horse racetracks," subject to the same restrictions regarding New Jersey college teams and collegiate events occurring in New Jersey. N.J. Const. Art. IV, § VII, ¶ 2(F).

After voters approved the sports-wagering constitutional amendment, the New Jersey Legislature enacted the Sports Wagering Act in 2012 ("2012 Law"), which provided for regulated sports wagering at New Jersey's casinos and racetracks. N.J. Stat. Ann. §§ 5:12A-1 *et seq.* (2012). The 2012 Law established a comprehensive regulatory scheme, requiring licenses for operators and individual employees, extensive documentation, minimum cash reserves, and Division of Gaming Enforcement access to security and surveillance systems.

Five sports leagues[1] sued to enjoin the 2012 Law as violative of PASPA.[2] The New Jersey Parties did

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[1] The sports leagues were the National Collegiate Athletic Association ("NCAA"), National Football League ("NFL"), National Basketball Association, National Hockey League, and the Office of the Commissioner of Baseball, doing business as Major League Baseball (collectively, the "Leagues").

[2] The Leagues named as defendants Christopher J. Christie, the Governor of the State of New Jersey; David L. Rebuck, the Director of the New Jersey Division of Gaming Enforcement ("DGE") and Assistant Attorney General of the State of New Jersey; and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission ("NJRC"). The New Jersey Thoroughbred

not dispute that the 2012 Law violated PASPA, but urged, instead, that PASPA was unconstitutional under the anti-commandeering doctrine. The District Court held that PASPA was constitutional and enjoined implementation of the 2012 Law. The New Jersey Parties appealed, and we affirmed in *National Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) (*Christie I*).

Christie I rejected the New Jersey Parties' argument that PASPA was unconstitutional. In explaining that PASPA does not commandeer the states' legislative processes, we stated: "[n]othing in [PASPA's] words *requires* that the states keep any law in place. All that is prohibited is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] *by law*' of gambling schemes." *Id.* at 232 (alterations in original). The New Jersey Parties had urged that PASPA commandeered the state because it prohibited the repeal of New Jersey's prohibitions on sports gambling; they reasoned that repealing a statute barring an activity would be equivalent to authorizing the activity, and "authorizing" was not allowed by PASPA. We rejected that argument, observing that "PASPA speaks only of 'authorizing *by law*' a sports gambling scheme," and "[w]e [did] not see how having *no law* in

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Horsemen's Association, Inc. ("NJTHA") intervened as a defendant, as did Stephen M. Sweeney, President of the New Jersey Senate, and Sheila Y. Oliver, Speaker of the New Jersey General Assembly ("State Legislators"). We collectively refer to these parties as the "New Jersey Parties." In the present case, the New Jersey Parties are the same, with some exceptions. NJTHA was named as a defendant (i.e., it did not intervene), as was the New Jersey Sports and Exposition Authority; the latter is not participating in this appeal. Additionally, Vincent Prieto, not Sheila Y. Oliver, is now the Speaker of the General Assembly.

place governing sports wagering is the same as authorizing it by law." *Id.* We further emphasized that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." *Id.* In short, we concluded that the New Jersey Parties' argument rested on a "false equivalence between repeal and authorization." *Id.* at 233.

The New Jersey Parties appealed to the United States Supreme Court, which denied certiorari. *Christie I* is now the law of the Circuit: PASPA is constitutional and does not violate the anti-commandeering doctrine.

Undeterred, in 2014, the Legislature passed the 2014 Law, SB 2460, which provided in part:

> any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events . . . .

N.J. Stat. Ann. § 5:12A-7. The 2014 Law specifically prohibited wagering on New Jersey college teams' competitions and on any collegiate competition occurring in New Jersey, and it limited sports wagering to "persons 21 years of age or older situated at such location[s]," namely casinos and racetracks. *Id.*

II. Procedural History and Parties' Arguments

The Leagues filed suit to enjoin the New Jersey Parties from giving effect to the 2014 Law. The District Court held that the 2014 Law violates PASPA, granted summary judgment in favor of the Leagues and issued a permanent injunction against the Governor of New Jersey, the Director of the New Jersey Division of Gaming Enforcement, and the Executive Director of the New Jersey Racing Commission (collectively, the "New Jersey Enjoined Parties").[3] The District Court interpreted *Christie I* as holding that

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[3] In the District Court, the New Jersey Enjoined Parties urged that the Eleventh Amendment gave them immunity such that they could not be sued in an action challenging the 2014 Law. The District Court rejected this argument, as do we, and we note that, while the issue was briefed, the New Jersey Enjoined Parties did not press—or even mention—this issue at oral argument. They contend that, because the 2014 Law is a self-executing repeal that requires no action from them or any other state official, they are immune from suit. This argument fails. The New Jersey Enjoined Parties are subject to suit under the *Ex parte Young* exception to Eleventh Amendment immunity, which "permit[s] the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)). The New Jersey Enjoined Parties are not arguing that other state officials should have been named instead of them; they are arguing that *no* state official can be sued regarding the 2014 Law. We disagree. The Leagues named the state officials who are most

PASPA offers two choices to states: maintaining prohibitions on sports gambling or completely repealing them. It reasoned that PASPA preempts the 2014 Law because the 2014 Law is a partial repeal that necessarily results in sports wagering with the State's imprimatur. The New Jersey Parties appealed.

On appeal, the New Jersey Parties argue that the 2014 Law complies with PASPA and is consistent with *Christie I* because the New Jersey Legislature effected a repealer as *Christie I* specifically permitted. The NJTHA argues that the District Court erred in granting injunctive relief to the Leagues because the Leagues have unclean hands from supporting sports gambling in other contexts, and that any injunctive relief should be limited to the Leagues' games and should not include games of entities who are not parties to this action.

The Leagues urge that the 2014 Law violates PASPA because it "authorizes" and "licenses" sports gambling. The United States submitted an amicus brief in support of the Leagues arguing that the 2014 Law impermissibly "licenses" sports wagering by confining the repeal of gambling prohibitions to licensed

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closely connected to the 2014 Law, i.e., the Governor, the Director of the DGE, and the Executive Director of the NJRC. The Leagues did not name officials who bear no connection whatsoever to the 2014 Law. *See Young*, 209 U.S. at 156 (explaining that plaintiffs cannot name just any state official, such as a "state superintendent of schools" simply "to test the constitutionality" of a law). *See also Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988) (noting that a suit against the governor would be appropriate when challenging a "self-enforcing statute" because "[t]he plaintiff would have been barred from challenging the statute by the eleventh amendment unless it could name the Governor as a defendant").

gambling facilities and thus, in effect, enlarging the terms of existing gaming licenses.

We conclude that the District Court did not err in striking down the 2014 Law.

III. Analysis[4]

A. The 2014 Law Violates PASPA

As a preliminary matter, we acknowledge New Jersey's salutary purpose in attempting to legalize sports gambling to revive its troubled casino and racetrack industries. The New Jersey Assembly Gaming and Tourism Committee chairman stated, in regards to the 2014 Law, that "[w]e want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do something for the gaming business in the state of New Jersey, which has been under tremendous duress . . . ." (App. 91.) New Jersey State Senator Ray Lesniak, a sponsor of the law, has likewise stated that "[s]ports betting will be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry." (App. 94.) And New Jersey State Senator Joseph Kyrillos stated that "New Jersey's continued prohibition on sports betting at our casinos and racetracks is contrary to our interest of supporting employers that provide tens of thousands of jobs and add billions to our state's economy" and that "[s]ports betting will help set New Jersey's wagering facilities apart from the competition and strengthen Monmouth Park and our struggling casino

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[4] "We review a district court's grant of summary judgment *de novo* . . . ." *Viera v. Life Ins. Co. of N. Am.*, 642 F.3d 407, 413 (3d Cir. 2011). "We review a district court's grant of a permanent injunction for abuse of discretion." *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 162 (3d Cir. 2011).

industry." (App. 138.) PASPA has clearly stymied New Jersey's attempts to revive its casinos and racetracks and provide jobs for its workforce.

Moreover, PASPA is not without its critics, even aside from its economic impact. It has been criticized for prohibiting an activity, i.e., sports gambling, that its critics view as neither immoral nor dangerous. It has also been criticized for encouraging the spread of illegal sports gambling and for making it easier to fix games, since it precludes the transparency that accompanies legal activities.[5] Simply put, "[w]e are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games' integrity and whether states should be permitted to license and profit from the activity—engender strong views." *Christie I*, 730 F.3d at 215. While PASPA's provisions and its reach are controversial and, some might say, unwise, "we are not asked to judge the wisdom of PASPA" and "[i]t is not our place to usurp Congress' role simply because PASPA may have become an unpopular law." *Id.* at 215, 241. We echo *Christie I* in noting that "New Jersey and any other state that may wish to legalize gambling on sports . . . are not left without redress. Just as PASPA once gave New Jersey preferential treatment in the context of gambling on sports, Congress may again

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[5] It has also been criticized as unconstitutional, but we held otherwise in *Christie I* and we cannot and will not revisit that determination here. *See Christie I*, 730 F.3d at 240 ("[N]othing in PASPA violates the U.S. Constitution. The law neither exceeds Congress' enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment or anywhere else in our Constitutional structure.").

choose to do so or . . . may choose to undo PASPA altogether." *Id.* at 240-41. Unless or until that happens, however, we are duty-bound to interpret the text of the law as Congress wrote it.

We now turn to the primary question before us: whether the 2014 Law violates PASPA. We hold that it does. Under PASPA, it shall be unlawful for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports gambling. 28 U.S.C. § 3702(1). We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.

First, the 2014 Law authorizes casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities. Without the 2014 Law, the sports gambling prohibitions would apply to casinos and racetracks. Appellants urge that the 2014 Law does not provide authority for sports gambling because we previously held that "[t]he right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people" and that "[w]e do not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Christie I*, 730 F.3d at 232. But this is not a situation where there are *no* laws governing sports gambling in New Jersey. Absent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks. Thus, the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited.

Second, the 2014 Law authorizes sports gambling by selectively dictating where sports gambling may

occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling. Under the 2014 Law, New Jersey's sports gambling prohibitions are specifically removed from casinos, gambling houses, and horse racetracks as long as the bettors are people age 21 or over, and as long as there are no bets on either New Jersey college teams or collegiate competitions occurring in New Jersey. The word "authorize" means, inter alia, "[t]o empower; to give a right or authority to act," or "[t]o permit a thing to be done in the future." Black's Law Dictionary 133 (6th ed. 1990).[6] The 2014 Law allows casinos and racetracks and their patrons to engage, under enumerated circumstances, in conduct that other businesses and their patrons cannot do. That selectiveness constitutes specific permission and empowerment.

Appellants place much stock in our statement in *Christie I* that their argument there rested on a "false equivalence between repeal and authorization." 730 F.3d at 233. They claim that the 2014 Law does not authorize sports gambling because it is only a "repeal" and, in *Christie I*, we stated that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law." *Id.* at 232. In other words, they argue that, because the 2014 Law is only a repeal removing prohibitions against sports gambling, it is not an "affirmative authorization" under *Christie I*. We agree that, had the 2014 Law repealed all prohibitions on sports gambling, we would be hard-pressed, given *Christie I*, to find an "authorizing by law" in violation of PASPA. But that is not

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[6] We cite the version of Black's Law Dictionary that was in effect in 1992, the year PASPA was passed.

what occurred here. The presence of the word "repeal" does not prevent us from examining what the provision actually does, and the Legislature's use of the term does not change the fact that the 2014 Law selectively grants permission to certain entities to engage in sports gambling. New Jersey's sports gambling prohibitions remain and no one may engage in such conduct save those listed by the 2014 Law. While artfully couched in terms of a repealer, the 2014 Law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is not a repeal; it is an authorization.

Third, the exception in PASPA for New Jersey, which New Jersey did not take advantage of before the one-year time limit expired, is remarkably similar to the 2014 Law. The exception states that PASPA does not apply to "a betting, gambling, or wagering scheme . . . conducted exclusively in casinos . . . , but only to the extent that . . . any commercial casino gaming scheme was in operation . . . throughout the 10-year period" before PASPA was enacted. 28 U.S.C. § 3704(a)(3)(B). The exception would have permitted sports gambling at New Jersey's casinos, which is just what the 2014 Law does. We can easily infer that, by explicitly excepting a scheme of sports gambling in New Jersey's casinos from PASPA's prohibitions, Congress intended that such a scheme would violate PASPA. If Congress had not perceived that sports gambling in New Jersey's casinos would violate PASPA, then it would not have needed to insert the New Jersey exception. In other words, if sports gambling in New Jersey's casinos does not violate PASPA, then PASPA's one-year exception for New Jersey

would have been superfluous. We will not read statutory provisions to be surplusage. *See Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). In order to avoid rendering the New Jersey exception surplusage, we must read the 2014 Law as authorizing a scheme that clearly violates PASPA.[7]

As support for their argument that the 2014 Law does not violate PASPA, Appellants cite the 2014 Law's construction provision, which provides that "[t]he provisions of this act . . . are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. N.J. Stat. Ann. § 5:12A-8. This conveniently mirrors PASPA's language providing that states may not "sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. 28 U.S.C. § 3702(1).

The construction provision does not save the 2014 Law. States may not use clever drafting or mandatory construction provisions to escape the supremacy of federal law. *Cf. Haywood v. Drown*, 556 U.S. 729, 742 (2009) ("[T]he Supremacy Clause cannot be evaded by formalism."); *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 382-83 (1990) ("[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of" a particular word). In the same vein, the

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[7] Granted, the 2014 Law applies to horse racetracks as well as casinos, while the PASPA exception for New Jersey refers only to casinos, but that does not change the significance of the New Jersey exception because it refers to gambling in places that already allow gambling, and the racetracks fall within that rubric.

New Jersey Legislature cannot use a targeted construction provision to limit the reach of PASPA or to dictate to a court a construction that would limit that reach. The 2014 Law violates PASPA, and the construction provision cannot alter that fact.

Appellants also draw a comparison between the 2014 Law and the 2012 Law, which involved a broad regulatory scheme, as evidence that the 2014 Law does not violate PASPA. It is true that the 2014 Law does not set forth a comprehensive scheme or provide for a state regulatory role, as the 2012 Law did. However, PASPA does not limit its reach to active state involvement or regulation of sports gambling. It prohibits a range of state activity, the least intrusive of which is "authorization" by law of sports gambling.

We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.[8]

B. Injunctive Relief

The NJTHA argues that the injunction should apply only to the parties who brought this suit and that gambling on the athletic contests of other entities, who are not parties to this suit, should be permitted.

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[8] Because we conclude that the 2014 Law authorizes by law sports gambling, we need not address the argument made by Appellees and Amicus that the 2014 Law also licenses sports gambling by permitting only those entities that already have gambling licenses or recently had such licenses to conduct sports gambling operations. We also do not address the argument of the State Legislators and the NJTHA that, to the extent that any aspect of the 2014 Law violates PASPA, we should apply the 2014 Law's severability clause. The State Legislators and the NJTHA offer no proposals regarding what provisions should be severed from the 2014 Law, and we do not see how we could sever it.

But PASPA does not limit its prohibition to sports gambling involving only entities who actually bring suit. PASPA provides that "[a] civil action to enjoin a violation of section 3702 . . . may be commenced . . . by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation." 28 U.S.C. § 3703. The NJTHA conflates the Leagues' right to bring suit with the remedy they may obtain. PASPA provides that the Leagues may "enjoin a violation of section 3702," without any limiting language. The 2014 Law violates PASPA in all contexts, not simply as applied to the Leagues, and, therefore, the District Court properly enjoined its application in full.

Finally, we need not dwell on the NJTHA's argument that the Leagues should not be entitled to equitable relief because they have unclean hands. The NJTHA contends that the Leagues are essentially hypocrites because they encourage and profit from sports betting, noting that the NFL has been scheduling games in London where sports gambling is legal, that the NCAA holds events in Las Vegas where sports gambling is legal, and that the Leagues sanction and encourage fantasy sports betting. These allegations fail to rise to the level required for application of the unclean hands doctrine. "The equitable doctrine of unclean hands applies when a party seeking relief has committed an unconscionable act immediately related to the equity the party seeks in respect to the litigation." *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 174 (3d Cir. 2001). It is not "unconscionable" for the Leagues to support fantasy sports and hold events in Las Vegas or London, nor is doing so "immediately related" to the 2014 Law. We

cannot conclude that the Leagues acted unconscionably, i.e., amorally, abusively, or with extreme unfairness, in relation to the 2014 Law.

IV. Conclusion

The 2014 Law violates PASPA because it authorizes by law sports gambling. We will affirm.

FUENTES, Circuit Judge, dissenting.

In response to *Christie I*, where we held that New Jersey's 2012 Sports Wagering Law ("2012 Law") violated PASPA, the New Jersey Legislature passed the 2014 Law. In addition to repealing the 2012 Law in full, the 2014 Law also repealed all prohibitions on sports wagering and any rules authorizing the State to, among other things, license or authorize a person to engage in sports wagering, with respect to casinos and gambling houses in Atlantic City and horse racetracks in New Jersey. The repealer also maintained prohibitions for persons under 21 and for wagering on New Jersey collegiate teams or any collegiate competition occurring in New Jersey. Likewise, the 2014 Law stripped New Jersey of *any* involvement in sports wagering, regulatory or otherwise. In essence, the 2014 Law renders previous prohibitions on sports gambling non-existent.

The majority, however, takes issue with what it terms the "selective" nature of the partial repeal. First, that the repeal applies to specific locations. That is, under the 2014 Law, wagering may only take place at casinos, gambling houses, and horse racetracks. Next, the restriction against betting by persons under the age of 21 would remain, and finally, restrictions against betting on New Jersey collegiate teams or any collegiate competition in New Jersey would remain. These restrictions, the majority concludes, amount to "authorizing" a sports-wagering scheme and, therefore, the 2014 Law must also violate PASPA. I disagree. As I see it, the issue is whether a partial repeal amounts to authorization. Because this

logic rests on the same false equivalence[1] we rejected in *Christie I*, I respectfully dissent.

The majority, however, maintains that the 2014 Law "authorizes" casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities.[2] According to the majority, "this is not a situation where there are *no* laws governing sports gambling in New Jersey" and "[a]bsent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks."[3] Yet, the majority is mistaken as to the impact of a partial repeal. Repeal is defined as to "rescind" or "an abrogation of an existing law by legislative act."[4] When a statute is repealed, "the repealed statute, in regard to its operative effect, is considered as if it had never existed."[5] A repealed statute is

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[1] A false equivalence is a logical fallacy which describes a situation where there is a logical and apparent equivalence, but when in fact there is none. This fallacy is categorized as a fallacy of inconsistency. Harry Phillips & Patricia Bostian, *The Purposeful Argument: A Practical Guide, Brief Edition* 129 (2014). In *Christie I*, we held that there was a false equivalence between repeal and authorization. 730 F.3d at 233.

[2] For brevity, I refer to the repeal of prohibitions as applying to casinos, gambling houses, and horse racetracks, with the understanding that the repeal applies to casinos and gambling houses in Atlantic City and horse racetracks in New Jersey for those over 21 not betting on New Jersey collegiate teams or any collegiate competition occurring in New Jersey.

[3] Maj. Op. 16-17.

[4] Black's Law Dictionary 1325 (8th ed. 2007).

[5] 73 Am. Jur. 2d Statutes § 264.

treated as if it never existed; a partially repealed statute is treated as if only the remaining part exists.[6]

The 2014 Law, then, renders the previous prohibitions on sports gambling non-existent. After the repeal, it is as if New Jersey never prohibited sports gambling in casinos, gambling houses, and horse racetracks. Therefore, with respect to those areas, there are no laws governing sports wagering and the right to engage in such conduct does not come from the state. Rather, the right to do that which is not prohibited stems from the inherent rights of the people.[7] The majority, however, states that "[a]bsent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks," and that, as such, "the 2014 Law provides the author-

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[6] *See, e.g., Ex Parte McCardle*, 74 U.S. 506, 514 (1868) ("[W]hen an act of the legislature is repealed, it must be considered . . . as if it never existed." (internal quotation marks omitted)); *Anderson v. USAir, Inc.*, 818 F.2d 49, 55 (D.C. Cir. 1987) ("Common sense dictates that repeal means a deletion. This court would engage in pure speculation were it to hold otherwise."); *In re Black*, 225 B.R. 610, 620 (Bankr. M.D. La. 1998) ("Can a statute use a repealed statute? Is a repealed statute something or is it nothing? We think the answers are 'no' and 'nothing.'"); *Kemp by Wright v. State*, 687 A.2d 715, 723 (N.J. 1997) ("In this State it is the general rule that where a statute is repealed and there is no saving[s] clause or a general statute limiting the effect of the repeal, the repealed statute . . . is considered as though it had never existed, except as to matters and transactions passed and closed." (quoting *Parsippany Hills Assocs. v. Rent Leveling Bd. of Parsippany-Troy Hills Twp.*, 476 A.2d 271, 275 (N.J. Super. 1984)).

[7] *Christie I*, 730 F.3d at 232.

ization for conduct that is otherwise clearly and completely legally prohibited."[8] We have refuted this position before. In *Christie I*, we held that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law."[9] Such an argument, we said, "rests on a false equivalence between repeal and authorization and reads the term 'by law' out of the statute."[10] We identified several problems in making this false equivalence—the most troublesome being that it "reads the term 'by law' out of the statute."[11] The majority's position does just that. In holding that a partial repeal of prohibitions is state authorization, the majority must infer authorization. PASPA, however, contemplates more. In *Christie I*, we pointed to the fact that New Jersey's 2012 amendment to its constitution, which gave the Legislature power to "authorize by law" sports wagering was insufficient to "authorize [it] by law."[12] We explained, "that the Legislature needed to enact the [2012 Law] itself belies any contention that the mere repeal of New Jersey's ban on sports gambling was sufficient to 'authorize [it] by law' . . . . [T]he . . . Legislature itself saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering."[13] This is no less true of a partial repeal than it

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[8] Maj. Op. 16-17.

[9] *Christie I*, 730 F.3d at 232.

[10] *Id.* at 233.

[11] *Id.*

[12] *Id.* at 232.

[13] *Id.*

would be of a total repeal—which the majority concedes would not violate PASPA. Thus, to reach the conclusion that the 2014 Law, a partial repeal of prohibitions, authorizes sports wagering, the majority necessarily relies on this false equivalence. It concedes as much when stating "the 2014 Law" (the repeal) provides "the authorization" for sports wagering. Of course, this is the exact false equivalence we identified, and dismissed as a logical fallacy, in *Christie I*.[14]

The majority does not believe it makes this false equivalence. To support its position, the majority relies on the "selective" nature of the 2014 Law contending that "the Legislature's use of the term ['repeal'] does not change the fact that the 2014 Law selectively grants permission to certain entities to engage in sports gambling."[15] First, it does not. There is no explicit grant of permission in the 2014 Law for *any* entity to engage in sports wagering. Second, not only does the majority fail to explain why such a partial repeal is equivalent to granting permission (by law) for these locations, but the very logic of such a position fails. If withdrawing prohibitions on "some" sports wagering is the equivalent to authorization by law, then withdrawing prohibitions on *all* sports wagering must be considered authorization by law.[16] Under

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[14] *Id.* at 233.

[15] Maj. Op. 18.

[16] Put another way, would a state violate PASPA if it enacted a complete repeal of sports-wagering prohibitions and later enacted limited prohibitions regarding age requirements and places where wagering could occur? There is simply no conceivable reading of PASPA that could preclude a state from restricting sports wagering.

this logic, New Jersey is left with no choice at all—it must uphold all prohibitions on sports wagering in perpetuity or until PASPA is no more. This is precisely the opposite of what we held in *Christie I*—"[n]othing in these words *requires* that the states keep any law in place"[17]—and why we found PASPA did not violate the anti-commandeering principle.

The majority, along with the United States, conceded that a complete repeal does not violate PASPA. Indeed, in its brief in opposition to New Jersey's petition for certiorari, the United States went as far as to concede that New Jersey could repeal its prohibitions in whole or in part.[18] Simply put, there is nothing special about a partial repeal and it, too, does not violate PASPA. The 2014 Law is a self-executing deregulatory measure that repeals existing prohibitions and regulations for sports wagering and requires the State to abdicate *any* control or involvement in sports wagering. I do not see, then, how the majority concludes that the 2014 Law authorizes sports wagering, much less in violation of PASPA.

The majority equally falters when it analogizes the 2014 Law to the exception Congress originally offered to New Jersey in 1992. The exception stated that PASPA did not apply to "a betting, gambling, or wagering scheme . . . conducted exclusively in casinos[,] . . . but only to the extent that . . . any commercial casino gaming scheme was in operation . . .

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[17] 730 F.3d at 232.

[18] Br. for the United States in Opp'n at 11, *Christie v. Nat'l Collegiate Athletic Ass'n*, Nos. 13-967, 13-979, and 13980 (U.S. May 14, 2014).

throughout the 10-year period" before PASPA was enacted.[19] Setting aside the most obvious distinction between the 2014 Law and the 1992 exception, that it contemplated a *scheme* that the 2014 Law does not authorize,[20] the majority misses the mark with this comparison when it states: "If Congress had not perceived that sports gambling in New Jersey's casinos would violate PASPA, then it would not have needed to insert the New Jersey exception."[21] Congress, however, did not perceive, or intend, for private sports wagering in casinos to violate PASPA. Instead, Congress prohibited sports wagering pursuant to state law. That the 2014 Law might bring about an increase in the amount of private, legal sports wagering in New Jersey is of no moment and the majority's reliance on such a possibility is misplaced. The majority is also wrong in an even more fundamental way: the exception Congress offered to New Jersey was exactly that, an exception to the proscriptions of PASPA. That is to say, with this exception, New Jersey could have "sponsor[ed], operate[d], advertise[d], promote[d], li-

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[19] 28 U.S.C. § 3704(a)(3)(B).

[20] For example, "[Division of Gaming Enforcement ("DGE")] now considers sports wagering to be 'non-gambling activity' . . . that is beyond DGE's control and outside of DGE's regulatory authority." App. 416. At oral argument, Appellants conceded they would have no authority or jurisdiction over sports wagering. *See, e.g.*, Tr. 14:12-15 ("Q: Sports betting is going to take place in the casino with no oversight whatsoever; A: That's right."); Tr. 21:15-20 ("All of the state and federal laws that deal with consumer protection, criminal penalties and the like remain in full force and effect at the sports betting venue. The only thing that doesn't get regulated is the sports betting itself.").

[21] Maj. Op. 19.

cense[d], or authorize[d] by law or compact" sports wagering. Under the 2014 Law, of course, New Jersey cannot and does not aim to do any of these things.

The majority fails to illustrate how the 2014 Law results in sports wagering *pursuant to state* law when there is no law in place as to several locations, no scheme created, and no state involvement. A careful comparison to the 2012 Law is instructive. The 2012 Law lifted New Jersey's ban on sports wagering and provided for the licensing of sports-wagering pools at casinos and racetracks in the State. Indeed, New Jersey set up a comprehensive regime for the licensing and close supervision and regulation of sports-wagering pools. For instance, the 2012 Law required any entity that wished to operate a "sports pool lounge" to acquire a "sports pool license." To do so, a prospective operator was required to pay a $50,000 application fee, secure DGE approval of all internal controls, and ensure that any of its employees who were to be directly involved in sports wagering obtained individual licenses from DGE and the Casino Control Commission. In addition, the regime required entities to, among other things, submit extensive documentation to DGE, to adopt new "house" rules subject to DGE approval, and to conform to DGE standards. This violated PASPA in the most basic way: New Jersey developed an intricate scheme to both authorize (*by law*) and license sports gambling. The 2014 Law repealed this entire scheme.

Without more, the majority is simply left calling a tail a leg—which, as the adage goes, does not make it so. Because I do not see how a partial repeal of prohibitions is tantamount to "authorizing by law" a sports-

wagering scheme in violation of PASPA, I respectfully dissent.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, s, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 14-6450 (MAS) (LHG)
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, s, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 12-4947 (MAS) (LHG) **OPINION**

SHIPP, District Judge

This matter comes before the Court on application for a preliminary injunction by Plaintiffs National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"),

and Office of the Commissioner of Baseball, doing business as Major League Baseball ("MLB"), (collectively "Plaintiffs" or the "Leagues") to enjoin Christopher J. Christie, Governor of the State of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; Frank Zanzuccki, Executive Director of the New Jersey Racing Commission ("State Defendants"); the New Jersey Sports and Exposition Authority ("NJSEA"); and New Jersey Thoroughbred Horsemen's Association ("NJTHA") (collectively "Defendants").[1] (ECF No. 12; 12-4947, ECF No. 174.)[2] On November 10, 2014, the Court notified the parties of its intent to consolidate the Leagues' application for a preliminary injunction with a final disposition on the merits. (ECF No. 50; 12-4947, ECF No. 192.) The Court conducted oral argument on November 20, 2014. The Court, having considered the parties' submissions and arguments, and for the reasons stated below, finds that the Leagues are entitled to summary judgment on Count One of the Complaint and a concomitant permanent injunction.

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[1] On November 6, 2014, the Presiding Officers of the New Jersey Legislature, Stephen M. Sweeney, President of the New Jersey Senate, and Vincent Prieto, Speaker of the New Jersey General Assembly ("Legislature Defendants"), requested leave to intervene (ECF No. 46), which was granted on November 7, 2014 (ECF No. 48).

[2] Unless otherwise noted, citations to the docket refer to Civil Action No. 14-6450.

I. Introduction

Sports betting continues to be an issue of great importance to New Jersey. In 2011, the people of New Jersey passed a referendum, approving a constitutional amendment that authorized sports gambling in the state at casinos and racetracks. Subsequently, New Jersey enacted legislation in 2012 that legalized and regulated sports gambling at New Jersey racetracks and casinos for individuals age twenty-one and older, with the exception of wagering on college sporting events that take place in New Jersey or on New Jersey college teams (the "2012 Law"). The Leagues then sued, and the Defendants challenged the constitutionality of the Professional and Amateur Sports Protection Act ("PASPA"). The State Defendants, the Legislature Defendants, and the NJTHA vigorously litigated the issue before the Undersigned and the Third Circuit Court of Appeals. Both courts found PASPA constitutional, and the United States Supreme Court declined certiorari. On October 17, 2014, the State enacted legislation repealing the 2012 Law and other provisions of state law related to gaming insofar as they bar sports wagering in certain contexts (the "2014 Law"). Defendants assert that the 2014 Law results in legal sports gambling at New Jersey racetracks and casinos for individuals age twenty-one and older, with the exception of wagering on college sporting events that take place in New Jersey or on New Jersey college teams. This case requires the Court to determine whether New Jersey's recent attempt to do indirectly what it could not do directly—bring sports wagering to New Jersey in a limited fashion—conflicts with PASPA.

It is a well-known principle that "the rule of law is sacrosanct, binding on all Americans." (Leagues' TRO Br., Decl. of Anthony J. Dreyer ("Dreyer Decl."), Ex. 8, Governor Christie's Statement Vetoing S. 2250, ECF No. 12-11.) The Supremacy Clause makes the Constitution and the laws passed pursuant to it the supreme law of the land and provides the mechanism to enforce uniform national policies. When state law contradicts with federal law, the Supremacy Clause operates to preclude states from following policies different than those set forth by federal law. As the Third Circuit noted in *Christie I*, to allow states to follow policies contrary to federal law would be "revolutionary," reducing the Constitution to the same impotent condition that existed under the Articles of Confederation. *See Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 230 (3d Cir. 2013), *cert. denied sub nom., Christie v. Nat'l Collegiate Athletic Ass'n*, 134 S. Ct. 2866 (2014) ("*Christie I*").

New Jersey's current desire to allow sports wagering within its borders is not unique to the State. While New Jersey is at the forefront of this movement, many states around the country appear poised to join should New Jersey provide a roadmap around PASPA. New Jersey's most recent legislation does not provide such a roadmap. While novel, the recent legislation still conflicts with PASPA and thus must yield to the federal law. As a result, to the extent the people of New Jersey disagree with PASPA, their remedy is to repeal the state's prohibition consistent with the Third Circuit's directive or work towards a repeal or amendment of PASPA in Congress. "Ignoring federal law, rather than working to reform federal standards,

is counter to our democratic traditions and inconsistent with . . . Constitutional values." (Leagues' TRO Br., Dreyer Decl., Ex. 8, Governor Christie's Statement Vetoing S. 2250, ECF No. 12-11.)

II. Background

A. The Professional and Amateur Sports Protection Act

Congress enacted PASPA, 28 U.S.C. §§ 3701-3704, in 1992 "to 'prohibit sports gambling conducted by, or authorized under the law of, any State or governmental entity' and to 'stop the spread of State-sponsored sports gambling.'" *Christie I*, 730 F.3d at 216 (quoting S. Rep. 102-248, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555). To that end, PASPA makes it unlawful for:

> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
>
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702. PASPA includes a grandfather clause, which exempts states with preexisting sports wagering laws. *Id.* § 3704. Additionally, PASPA

granted New Jersey a one-year window to legalize wagering on sports, but New Jersey chose not to exercise that option. *Christie I*, 730 F.3d at 216 (citing § 3704). At the time Congress enacted PASPA, "*all but one* state prohibited broad state-sponsored gambling," but states, including New Jersey, were beginning to consider different laws that would allow sports wagering in their states. *Id.* at 234; *see also* S. Rep. 102-248, at 5. PASPA's legislative history makes clear that Congress enacted PASPA to "keep sports gambling from spreading" pursuant to a state scheme. S. Rep. 102-248, at 5.

B. *Christie I*: The 2012 Law

Roughly twenty years after the enactment of PASPA, New Jersey sought to adopt legalized sports wagering within its borders. In 2010, the New Jersey Legislature held public hearings regarding sports wagering and ultimately asked New Jersey voters to consider an amendment to the State's Constitution,[3] to

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[3] The official ballot question read: "Shall the amendment to Article IV, Section VII, paragraph 2 of the Constitution of the State of New Jersey, agreed to by the Legislature, providing that it shall be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City and at racetracks, in-person or through an account wagering system, on the results of professional, certain college, or amateur sport or athletic events, be approved?" *See* S. Con. Res. 49, 214th Leg. (N.J. 2010). The interpretative statement that appeared in conjunction with the ballot question stated: "This constitutional amendment would authorize the Legislature to pass laws allowing sports wagering at Atlantic City casinos and at racetracks. Wagers could be placed on professional, certain college, or amateur sport or athletic events. However, wagers could not be placed on college games that take place in New Jersey or in which a New Jersey college team participates regardless of where the game takes place. A wager could be placed at a casino or racetrack either in-

make it "lawful for the Legislature to authorize by law wagering . . . on the results of any professional, college, or amateur sport or athletic event." N.J. Const. art. IV, § 7, ¶ 2(D), (F). In the November 2011 general election, New Jersey voters approved the referendum, and the constitutional amendment became effective on December 8, 2011. On January 17, 2012, pursuant to this constitutional amendment, New Jersey enacted the 2012 Law, N.J. Stat. Ann. §§ 5:12A-1 to -4, -5 to -6 (2012). In response to the enactment of the 2012 Law, on August 7, 2012, the Leagues filed a complaint against the State Defendants claiming that the 2012 Law violated PASPA.[4] (12-4947, ECF No. 1.)

On February 28, 2013, after careful consideration of the positions advanced during the course of the litigation, this Court found that "Congress acted within its power and [PASPA] does not violate the United States Constitution," and entered a permanent injunction. *Christie I*, 926 F. Supp. 2d 551, 554 (D.N.J. 2013). On September 17, 2013, the Third Circuit, in a *de novo* review, affirmed this Court's decision. The Third Circuit held that: (1) the Leagues had standing to bring the action; (2) PASPA's enactment was within Congress's power under the Commerce Clause; (3) PASPA did not violate the anti-commandeering

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person or from any other location through an account wagering system that uses telephone, Internet or other means." *Id.*

[4] On November 21, 2012, the Legislature Defendants and the NJTHA filed Motions to Intervene (12-4947, ECF Nos. 72, 75), which were granted on December 11, 2012 (12-4947, ECF No. 102). On January 22, 2013, the United States filed a Notice of Intervention in response to the Court's Order Certifying Notice of a Constitutional Challenge to the United States Attorney General. (12-4947, ECF Nos. 128.)

principle; and (4) PASPA was not invalid under the doctrine of equal sovereignty. *See Christie I*, 730 F.3d at 215. On June 23, 2014, the United States Supreme Court denied certiorari. *See Christie I*, 134 S. Ct. 2866 (2014).

On the same day the Supreme Court denied Defendants' certiorari petition, legislation was introduced in the New Jersey Senate "[p]artially repealing prohibitions against sports wagering at racetracks and casinos in New Jersey." S. 2250, 216th Leg. (N.J. 2014) (vetoed). Three days later, the Senate and the Assembly both passed the legislation without any recorded debate or discussion. *Id.* On August 8, 2014, Governor Christie vetoed the legislation. Governor Christie said the legislation was "a novel attempt to circumvent the Third Circuit's ruling" in *Christie I*. (Leagues' TRO Br., Dreyer Decl., Ex. 8, Governor Christie's Statement Vetoing S. 2250, ECF No. 12-11.) Governor Christie stated that, while he did "not agree with the Circuit Court's conclusion, [he] believe[s] that the rule of law is sacrosanct, binding on all Americans." (*Id.*) Governor Christie acknowledged: "[i]gnoring federal law, rather than working to reform federal standards, is counter to our democratic traditions and inconsistent with the Constitutional values I have sworn to defend and protect." (*Id.*)

One month later, on September 8, 2014, New Jersey's Acting Attorney General issued a Law Enforcement Directive to all New Jersey law enforcement personnel regarding the 2012 Law. The Directive concluded that, based on the severability clause in the statute, the central provisions of the 2012 Law, which establish that casinos or racetracks may operate

sports pools, remained in effect, and thus, such activity was exempted from criminal and civil liability. (State Defs.' Clarification Mot. 1-2, 12-4947, ECF No. 161.) On the same day, the State Defendants filed a motion in *Christie I* requesting that the Court clarify its permanent injunction or modify its injunction to conform to this interpretation of the Third Circuit's decision. (*Id.* at 8-9.) In connection with this request, the State Defendants secured a moratorium on sports wagering in New Jersey from all casinos and racetracks until October 26, 2014. (Oct. 9, 2014 Ltr., Ex. A, 12-4947, ECF No. 168.) On October 17, 2014, the State Defendants withdrew their motion for clarification or modification and notified the Court that Governor Christie signed New Jersey Senate Bill 2460 into law. (Oct. 17, 2014 Ltr., 12-4947, ECF No. 173.)

C. *Christie II*: The 2014 Law

The 2014 Law was first introduced in the Senate on October 9, 2014. S. 2460, 216th Leg. (N.J. 2014) (enacted). On October 14, 2014, the Senate and the Assembly passed the bill with a 28-1 vote and 73-4-0 vote, respectively. *Id.* T here is no recorded floor debate or discussion for the 2014 Law. One of the 2014 Law's sponsors, however, touted the legislation as "a short step away from getting this done and a lot closer to bringing sports betting to New Jersey." (Leagues' TRO Br., Dreyer Decl., Ex. 10, ECF No. 12-13 (quoting State Senator Raymond J. Lesniak).) On October 17, 2014, Governor Christie signed the legislation into law. (Oct. 17, 2014 Ltr., 12-4947, ECF No. 173.)

The 2014 Law is designed to *partially repeal* all state laws and regulations prohibiting sports wagering, but only in certain circumstances. The 2014 Law

"partially repeal[s] the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events." S. 2460, 216th Leg. (2014) (enacted). In addition to repealing the 2012 Law, the 2014 Law repeals provisions of New Jersey law governing criminal penalties for gambling, N.J. Stat. Ann. §§ 2C:37-1 to -9, civil penalties for gambling, N.J. Stat. Ann. §§ 2A:40-1 to -9, the regulation of equine breeding and racing, N.J. Stat. Ann. §§ 5:5-1 to -189, and the Casino Control Act, N.J. Stat. Ann. §§ 5:12-1 to -233, as well as "any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers." N.J. Stat. Ann. § 5:12A-7. The 2014 Law, however, only repeals these laws "to the extent they apply or may be construed to apply [to sports wagering] at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, . . . by persons 21 years of age or older." *Id.* The 2014 Law also excludes "collegiate sports contest[s] or collegiate athletic event[s] that take[] place in New Jersey or . . . sport contest[s] or athletic event[s] in which any New Jersey college team participates regardless of where the event takes place" from the definition of "collegiate sport contest or athletic event." *Id.*

The 2014 Law explicitly states that it "shall be construed to *repeal* State laws and regulations." *Id.* § 5:12A-8 (emphasis added). The legislative statement

immediately following the 2014 Law provides that it implements the Third Circuit's decision in *Christie I*. It quotes select portions of the *Christie I* decision, including that the Third Circuit does "not read PASPA to prohibit New Jersey from repealing its ban on sports wagering," and "it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or *what the exact contours of the prohibition will be*." S. 2460 at 3-4. The 2014 Law also contains a broad severability clause. N.J. Stat. Ann. § 5:12A-9.

In response to the 2014 Law, the Leagues filed a Complaint for Declaratory and Injunctive Relief (the "Complaint") on October 20, 2014, against the State Defendants, the NJTHA, and the NJSEA ("*Christie II*"). (ECF No. 1.) In the Complaint, the Leagues allege that "[f]or years, New Jersey has been attempting to devise a way to get around [PASPA's] unambiguous prohibitions and authorize sports gambling in Atlantic City casinos and horse racetracks throughout the state." (*Id.* ¶ 3.) The Complaint asserts four causes of action: (1) violation of PASPA, 28 U.S.C. § 3702(1), against the State Defendants; (2) violation of the New Jersey Constitution against all Defendants; (3) violation of PASPA, 28 U.S.C. § 3702(1), against the NJSEA; and (4) violation of PASPA, 28 U.S.C. § 3702(2), against the NJTHA. (*Id.* ¶¶ 58-74.) All of the claims asserted by the Leagues are based on violations of PASPA pursuant to the 2014 Law. In the Complaint, the Leagues seek an order declaring that either the 2014 Law violates PASPA or, alternatively, the 2014 Law violates the New Jersey Constitution. (*Id.* at 22-23.) The Leagues additionally seek to enjoin

Defendants from implementing or enforcing the 2014 Law. (*Id.*)

On October 21, 2014, the Court conducted, on the record, a telephone status conference regarding the briefing schedule for the Leagues' application for temporary restraints and a preliminary injunction. During the conference, counsel for the NJTHA confirmed that Monmouth Park planned to start accepting bets on Sunday, October 26, 2014. The same day, the Leagues filed an order to show cause with temporary restraints seeking a temporary restraining order and preliminary injunction against Defendants in both *Christie I* and *Christie II*.[5] On October 22, 2014, the NJSEA, the NJTHA, the State Defendants, and the Legislature Defendants submitted their opposition briefs. The Leagues submitted their reply brief on October 23, 2014. With an extremely limited amount of time to render a decision based on the NJTHA's planned start date for sports wagering, on October 24, 2014, the Court issued an oral opinion from the bench granting the Leagues' application for a temporary restraining order and requiring the Leagues to post a bond, pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, in the amount of $1.7 million.[6]

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[5] As the Court has consolidated its determination of the Leagues' application for a preliminary injunction with a decision on the merits through summary judgment, the Leagues' application for a preliminary injunction is terminated as moot in both *Christie I* (12-4947, ECF No. 174) and *Christie II* (ECF No. 12).

[6] To allow for additional briefing on the Leagues' application for a preliminary injunction, the Court extended the temporary restraining order for an additional fourteen days, until November 21, 2014, and ordered the Leagues to post an additional bond

Also, on October 24, 2014, the Court issued a Scheduling Order requiring the parties to e-file joint correspondence that provided: (1) whether any party sought discovery prior to the Court's decision on the preliminary injunction application, (2) their positions regarding the necessity of a preliminary injunction hearing, and (3) a proposed schedule for supplemental briefing, if necessary. (ECF No. 33.) By correspondence dated October 27, 2014, the parties informed the Court that no discovery was necessary, nor evidentiary hearing required, in connection with the pending preliminary injunction application. (ECF No. 35.)

On November 3, 2014, the NJSEA, the NJTHA, the State Defendants, and the Legislature Defendants submitted their opposition briefs (ECF Nos. 42-44; 12-4947, ECF No. 189). The Leagues submitted a reply brief on November 7, 2014. (ECF No. 49; 12-4947, ECF No. 191.) In an Order dated November 10, 2014, the Court provided notice to all parties of its intention to consolidate the application for a preliminary injunction with a decision on the merits and allowed the parties to file additional correspondence by November 17, 2014. (ECF No. 50; 12-4947, ECF No. 192.) By Order dated November 19, 2014, the Court clarified its earlier Order that "the Court shall consolidate Plaintiffs' application for a preliminary injunction with a decision on the merits through summary judgment." (ECF No. 56.) The Court heard oral argument on November 20, 2014.

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in the amount of $1.7 million by November 10, 2014. (ECF No. 38.)

III. Legal Standard

Rule 65 of the Federal Rules of Civil Procedure "empowers district courts to grant preliminary injunctions." *Doe v. Banos*, 713 F. Supp. 2d 404, 410 (D.N.J.), *aff'd*, 416 F. App'x 185 (3d Cir. 2010). "Because the scope and procedural posture of a hearing for a preliminary injunction is significantly different from a trial on the merits . . . 'it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.'" *Anderson v. Davila*, 125 F.3d 148, 157 (3d Cir. 1997) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). In appropriate circumstances, however, Rule 65(a)(2) provides a district court with the discretion to "advance the trial on the merits and consolidate it with the [preliminary injunction] hearing." Fed. R. Civ. P. 65(a)(2). A district court may also convert a decision on a preliminary injunction application into a final disposition on the merits by granting summary judgment as long as sufficient notice is provided pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Krebs v. Rutgers*, 797 F. Supp. 1246, 1253 (D.N.J. 1992); *Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397 n.4 (9th Cir. 1990); *see also* Fed. R. Civ. P. 56(f).

Under Rule 56, summary judgment is appropriate if the record shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[P]reemption is primarily a question of law . . . ." *Jeter v. Brown & Williamson Tobacco Corp.*, 113 F. App'x 465, 467 (3d Cir. 2004); *see Travitz v. Ne. Dep't ILGWU Health & Welfare Fund*, 13 F.3d 704, 708 (3d

Cir. 1994) ("The issue of preemption is essentially legal . . . .") Further, where a court finds the issue of preemption to be dispositive, the remaining claims and issues need not be addressed. *See, e.g.*, *Stepan Co. v. Callahan Co.*, 568 F. Supp. 2d 546, 549 (D.N.J. 2008).

The Third Circuit has held, in accordance with principles of due process, that a district court should give the parties notice of its intent prior to entering summary judgment *sua sponte*. *See Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 280 (3d Cir. 2010). Notice is sufficient, however, "when 'the targeted party had reason to believe the court might reach the issue and received a fair opportunity to put its best foot forward.'" *Zimmerlink v. Zapotsky*, 539 F. App'x 45, 49 (3d Cir. 2013) (quoting *Gibson v. Mayor & Council of City of Wilmington*, 355 F.3d 215, 223-24 (3d Cir. 2004) (finding no notice is required if there is a fully developed record, a lack of prejudice to the parties, and a decision on a purely legal issue)). "Even if a court fails to comply with the requirements of Rule 56(f), however, any such error 'may be excused if the failure was a harmless error.'" *Zimmerlink*, 539 F. App'x at 49 (quoting *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989)).

Advancing a final disposition on the merits, through summary judgment, and consolidating it with the preliminary injunction application is appropriate in this case. Here, the preliminary injunctive relief the Leagues seek is the same relief they hope to ultimately obtain through a permanent injunction. Additionally, the merits of the case have been extensively briefed by all parties. The parties informed the Court that no discovery or evidentiary hearing was required

on the preliminary injunction application. (Oct. 27, 2014 Ltr., ECF No. 35.) Significantly, the parties' briefing does not identify any factual disputes for the Court to resolve at trial; rather, the parties' primary disagreement concerns whether the 2014 Law is preempted by PASPA. Furthermore, the parties had reason to believe the Court might reach the issue. All of the parties are well aware of the procedural history in *Office of the Commissioner of Baseball v. Markell*, 579 F.3d 293, 297 (3d Cir. 2009), another case interpreting PASPA in which the court consolidated an appeal of a denial of a preliminary injunction with a decision on the merits. In addition, the Leagues raised the request in their briefing. Moreover, the Court provided notice to the parties of its intent to consolidate the Leagues' application for a preliminary injunction with a decision on the merits. While "[i]t is often noted that the wheels of justice move slowly[,] . . . . that is not always the case. When a party seeks injunctive relief, the stakes are high, time is of the essence, and a straightforward legal question is properly presented . . . , prudence dictates that [the court] answer that question with dispatch." *Markell*, 579 F.3d at 297 (finding broad scope of appellate review to decide merits of a purely legal issue on appeal from preliminary injunction ruling). Accordingly, this is an appropriate case in which to consolidate the application for a preliminary injunction with summary judgment, as the Court is presented with purely a legal question.[7]

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[7] On November 17, 2014, all parties submitted correspondence in response to the Court's November 10, 2014 Order providing notice of its intention to consolidate the application for a preliminary injunction with a decision on the merits. The Leagues, the State Defendants, the Legislature Defendants, and the NJSEA

IV. Analysis

The primary question in this case is whether PASPA, a federal statute that prohibits sports wagering pursuant to a state scheme, preempts a state law that *partially repeals* New Jersey's prohibitions on sports wagering at casinos and racetracks in the state. To answer this question, the Court must consider both the Third Circuit's holding in *Christie I* and ordinary preemption principles.

The parties agree that the Third Circuit's decision in *Christie I*, which held that PASPA preempted the 2012 Law and left New Jersey a choice to either maintain or to repeal its prohibition on sports wagering, informs the Court's analysis in this case. The parties disagree, however, as to the exact scope of conduct PASPA operates to preempt. Defendants interpret the Third Circuit's decision in *Christie I* to allow New

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did not object to the Court rendering a summary judgment decision. (ECF Nos. 51, 52, 54.) The NJTHA objects to summary judgment at this stage of litigation. (ECF Nos. 53, 61.) The NJTHA primarily asserts that the Court did not provide fair notice that it would sua sponte consider summary judgment. In addition, the NJTHA intends to assert Plaintiffs' unclean hands as an affirmative defense. The Court is not persuaded by either argument. The Court provided notice to all parties on November 10, 2014, of its intention to consolidate the preliminary injunction application with a decision on the merits. The Court also provided the parties with the opportunity to raise any issues. After careful consideration of the NJTHA's arguments, the Court nevertheless finds its notice sufficient in light of the legal nature of the inquiry. In addition, no injunction is being entered against the NJTHA. Therefore, it is unnecessary for the Court to determine the validity of the NJTHA's assertion of unclean hands. The dispositive legal issue before the Court, as the NJTHA conceded at oral argument, is whether the 2014 Law is invalid as preempted by PASPA. (Oral Arg. Tr. 42:5-9 Nov. 20, 2014.)

Jersey to "partially repeal any existing laws that apply to sports wagering (as New Jersey has done with the [2014 Law])." (Legislature Defs.' Opp'n Br. 4, 12-4947, ECF No. 189.) On the other hand, the Leagues insist that the Third Circuit's holding in *Christie I* requires that New Jersey either maintain its prohibition or completely deregulate the field of sports wagering.[8] (Leagues' TRO Br. 17, ECF No. 12.)

The Court agrees with the Leagues' main contention, namely, that the 2014 Law is preempted by PASPA. The Court, however, finds that the present case is not nearly as clear as either the Leagues or the Defendants assert. This case presents the novel issue of whether the 2014 Law, which purports to *partially repeal* New Jersey legislation, nevertheless is preempted by PASPA. In analyzing this novel issue, the Court will begin by discussing the Third Circuit's decision in *Christie I*, including the scope of its holding and the instruction it provides for deciding the present inquiry. The Court will then discuss relevant preemption principles.

A. The Third Circuit's Decision in *Christie I*

The Third Circuit in *Christie I* affirmed this Court's decision and, in doing so, found that PASPA was a constitutional exercise of Congress's Commerce Clause power and did not violate anti-commandeering

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[8] The Leagues appeared to retreat from an "all or nothing" position during oral argument. At oral argument counsel suggested that when there is not a complete repeal, preemption must be determined on a case-by-case basis. (Oral Arg. Tr. 11:11-16 Nov. 20, 2014.)

principles derived from the Tenth Amendment. Accordingly, as much as Defendants would prefer, *Christie II* is not, and cannot be, about the constitutionality of PASPA; instead, *Christie II* concerns the doctrine of preemption. While the Third Circuit in *Christie I* addressed the issue of preemption and found that PASPA "operates via the Supremacy Clause to invalidate contrary state action," it did so only in the context of the 2012 Law. The Third Circuit's reasoning in *Christie I*, however, provides a framework for the analysis of the issues raised in *Christie II*: whether PASPA's preemptive scope operates to invalidate the 2014 Law. Of particular relevance are (1) the Third Circuit's findings as to the congressional purpose of PASPA and (2) the Third Circuit's discussion as to what PASPA prohibits with respect to state legislation regarding sports wagering under its anti-commandeering analysis.

1. The Third Circuit's Findings as to the Congressional Purpose of PASPA

In affirming *Christie I*, the Third Circuit looked directly to the text and legislative history of PASPA to determine Congress's intent. In gleaning Congress's intent, the Third Circuit found that the goal of Congress in enacting PASPA was "to ban gambling pursuant to a state scheme— because Congress was concerned that state-sponsored gambling carried with it a label of legitimacy that would make the activity appealing." *Christie I*, 730 F.3d at 237. As the Third Circuit noted in *Christie I*, Congress saw "'[s]ports gambling [as] a national problem' . . . because '[o]nce a State legalizes sports gambling, it will be extremely difficult for other States to resist the lure.'" *Id.* at 216

(quoting S. Rep. 102-248, at 5). Congress was concerned that "[w]ithout Federal legislation, sports gambling [would] likely . . . spread on a piecemeal basis and ultimately develop an irreversible momentum." S. Rep. 102-248, at 5. Although all but one state prohibited sports gambling at the time PASPA was enacted in 1992, *Christie I*, 730 F.3d at 234, Congress was cognizant that states were beginning to consider a wide variety of gambling schemes that would allow sports gambling in their states, including New Jersey. *See* S. Rep. 102-248, at 5. Thus, the Third Circuit saw PASPA as Congress's way of making it harder for states to "to turn their backs on the choices they previously made." *Christie I*, 730 F.3d at 234.

The Third Circuit's analysis of the congressional purpose behind PASPA demonstrates that Congress's concern with sports wagering extended beyond the mere form of a state's regulation. Rather, Congress's concern related to the potential for "state scheme[s]" implementing sports gambling and the "label of legitimacy" that would exist as a result. By imposing a hard choice, Congress sought to avoid the appearance of state-sanctioned sports wagering. The Third Circuit's findings regarding the congressional purpose of PASPA provide a backdrop to this Court's application of preemption principles to PASPA and the 2014 Law.

2. The Third Circuit's Anti-Commandeering Analysis

In determining whether PASPA impermissibly commandeers the states, the Third Circuit in *Christie I* first found that PASPA uses "classic preemption language that operates, via the Constitution's Supremacy Clause, to invalidate state laws that are contrary to

the federal statute." *Christie I*, 730 F.3d at 226 (citations omitted). Finding that PASPA clearly preempts contrary state law through the Supremacy Clause, the Third Circuit turned to Defendants' argument that PASPA nonetheless violates anti-commandeering principles. *Id.* at 228. In support of this analysis, the Third Circuit provided an in-depth and comprehensive review of the Supreme Court's anti-commandeering jurisprudence. *Id.* at 227-29. The Third Circuit then applied the principles derived from that jurisprudence to determine whether PASPA violates the anti-commandeering principle when it "simply operate[s] to invalidate contrary state law" under the Supremacy Clause. *Id.* at 230. The Third Circuit recognized that no court has ever held that "applying the Supremacy Clause to invalidate a state law contrary to federal proscriptions is tantamount to direct regulation over the states, to an invasion of their sovereignty, or to commandeering." *Id.* at 229-30.

The Third Circuit then determined that the mandate of PASPA is unlike those federal laws that had previously been struck down on the basis of impermissible commandeering. The Supreme Court in *New York v. United States*, 505 U.S 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), struck down federal laws on the basis that both required some affirmative action on the part of states in order to implement the federal law at issue. *Christie I*, 730 F.3d at 231. In connection with this distinction, the Third Circuit confronted Defendants' position that PASPA "impose[s] an affirmative requirement [on] states . . . , by prohibiting them from repealing anti- sports wagering provisions." *Id.* at 232. The court rejected this argument, holding instead that PASPA does not restrict

states from removing their prohibitions on sports betting. "Nothing in [Section 3702(1)] *requires* that the states keep any law in place." *Id.* (emphasis in original). Rather, the court stated, "[a]ll that is prohibited is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] *by law*' of gambling schemes." *Id.* (emphasis and alterations in original). That is, the Third Circuit found PASPA preempts only a state's support of sports wagering through legislative action. The court continued, "[w]e do not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Id.* (emphasis in original). In other words, "the lack of an affirmative prohibition on an activity does not mean it is *affirmatively* authorized by law." *Id.* (emphasis in original).

Concluding that PASPA's prohibition was different than the affirmative requirements struck down in *New York* and *Printz*, the Third Circuit reasoned that "PASPA's straightforward *prohibition* on action may be recast as presenting two *options*." *Id.* at 233 (emphasis in original). Under the framework of PASPA, according to the Third Circuit, states are presented with "two 'choices,'" neither of which "affirmatively require[] the states to enact a law, and both choices leave much room for the states to make their own policy":

> [O]*n the one hand, a state may repeal its sports wagering ban*, a move that will result in the expenditure of no resources or effort by any official. *On the other hand, a state may choose to keep a complete ban on sports gambling*, but it is left up to each state to decide how much of a law enforcement priority it wants to make

> of sports gambling, or what the exact contours of the prohibition will be.[9]

Id. (emphasis added). Thus, the Third Circuit recognized that a state's choice in eliminating its ban on sports wagering is limited to a simple repeal. Conversely, if a state chooses to maintain its prohibition, the state possesses a degree of flexibility, both in its enforcement of the prohibition and in its definition of the "complete ban['s]" "exact contours." Further, the Third Circuit emphasized that these two choices are "not easy choices." *Id.* "But the fact that Congress gave the states a hard or tempting choice does not mean that they were given no choice at all." *Id.* Indeed, the court reasoned that "Congress may have suspected that most states would choose to keep an actual prohibition on sports gambling on the books, rather than permit that activity to go unregulated."[10] *Id.*

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[9] Defendants go to great lengths to recast this passage in a light contrary to its meaning. The entire passage is included in full so that its context can be examined.

[10] The Supreme Court's anti-commandeering jurisprudence, which the Third Circuit relied upon, provides additional support for this reading of *Christie I*. In *F.E.R.C. v. Mississippi*, the Court similarly recognized a binary choice put to states: "either abandon[] regulation of the field altogether or consider[] the federal standards." 456 U.S. 742, 766, 767 n.30 (1982) ("[H]ere, the States are asked to regulate in conformity with federal requirements, or not at all."). The Court also recognized this choice to be a hard choice for states to make; yet, the difficulty of the choice did "not change the constitutional analysis." *Id.* at 767 ("[I]t may be unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA's requirements."). Similarly, the Court, in New York, recognized this recurrent choice in anti-commandeering cases. 505 U.S. at 167 ("[W]here Congress has the authority to regulate private activity under the Commerce

This interpretation of the Third Circuit's decision is buttressed by the opinion of The Honorable Thomas I. Vanaskie, U.S.C.J., in *Christie I*, concurring in part and dissenting in part. Judge Vanaskie dissented from the majority on the specific basis that PASPA impermissibly commandeered state governments. *Id.* at 241 (Vanaskie, J., dissenting). Judge Vanaskie's position was a direct result of the majority's determination regarding the scope of PASPA: "according to my colleagues, PASPA essentially gives the states the choice of allowing totally unregulated betting on sporting events or prohibiting all such gambling." *Id.*; *see also id.* at 250 n.9 ("The majority asserts that the two 'choices' presented to a state by PASPA—to 'repeal its sports wagering ban [or] to keep a complete ban on sports wagering'—'leave much room for the states to make their own policy.'").

Based on the foregoing review, the Third Circuit discerned that PASPA offers two choices to states: a state may either maintain its prohibition on sports betting or may completely repeal its prohibition. The Third Circuit held that even if these are a state's only choices under PASPA, the law does not violate anti-commandeering principles and thus is constitutional. Although some portions of the court's opinion, read in isolation, may suggest a contrary position, the Third Circuit's decision, in its entirety, interprets PASPA to allow states only these two options. These principles

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Clause, we have recognized Congress's power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.") (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

provide a guide to this Court in determining whether the 2014 Law is preempted by PASPA.

B. Preemption Principles

As discussed, ordinary preemption principles also guide the Court's decision. Preemption doctrine is rooted in the Supremacy Clause of the United States Constitution. Article VI declares that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, state law that "interferes with or is contrary to federal law" is preempted. *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 395 (3d Cir. 2010) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). "While the Supremacy Clause plainly provides Congress with the constitutional power to preempt state law, the challenge for courts has been deciding when a conflict between state and federal law requires application of that power." *Deweese v. Nat'l R.R. Passenger Corp.*, 590 F.3d 239, 245 (3d Cir. 2009) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Over the years, the Supreme Court has recognized three types of preemption: express preemption, implied conflict preemption, and field preemption.[11] *See*

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[11] The Third Circuit in *Christie I*, in an alternative holding, held that, "to the extent PASPA coerces the states into keeping in place their sports-wagering bans," such coercion does not violate principles of anti-commandeering because Congress could otherwise have preempted the field. See 730 F.3d at 235-36. Looking at PASPA in the context of field preemption, the Third Circuit found that "PASPA gives states the choice of either implementing a ban on sports gambling or of accepting complete deregulation of that field as per the federal standard." *Id.* at 235.

Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985). "A federal enactment expressly preempts state law if it contains language so requiring." *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 239 (3d Cir. 2009), *aff'd sub nom., Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011) (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001)). When construing an express preemption clause, a reviewing court must begin by examining the "plain wording of the clause," as this "necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). "Though the language of the provision offers a starting point, courts are often called upon to 'identify the domain expressly pre-empted by that language.'" *Bruesewitz*, 561 F.3d at 239 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996)); *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) ("If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains."). This analysis is guided by two principles: (1) "[c]ongressional purpose is the ultimate touchstone of [the] inquiry," and (2) "courts must operate under the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress." *Bruesewitz*, 561 F.3d at 239 (internal quotations, citations, and alterations omitted).

Implied conflict preemption "nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an obstacle to the accomplishment

and execution of the full purposes and objectives of Congress." *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010) (internal quotations omitted). "When confronting arguments that a law stands as an obstacle to [c]ongressional objectives, a court must use its judgment: 'What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.'" *Bruesewitz*, 561 F.3d at 239 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)). "Furthermore, implied preemption may exist even in the face of an express preemption clause." *Id.* at 239; *see also Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) ("Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not pre- empted," but that "does not mean that the express clause entirely forecloses any possibility of implied pre-emption."). And while "courts define the categories of preemption separately[,] the categories are not 'rigidly distinct.'" *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 406 (3d Cir. 2012), *cert. denied sub nom., Dir. of Dep't of Revenue of Mont. v. Dep't of Treasury*, 133 S. Ct. 2735 (2013) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)).

C. The 2014 Law is Preempted by PASPA

In light of the Third Circuit's decision in *Christie I* and with the above preemption principles in mind, the Court must now determine whether the 2014 Law is preempted by PASPA.[12] Count One of the League's

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[12] The State Defendants claim that because the 2014 Law is self-executing—that is, "the State Defendants have no involvement in [its] enforcement or administration"—the Eleventh Amendment bars this Court's adjudication of the Leagues' claim

Complaint asserts that the 2014 Law violates PASPA, and thus, the 2014 Law must be declared unlawful. (Compl. ¶¶ 58-61, ECF No. 1.) The 2014 Law only partially repeals prohibitions on sports wagering in New Jersey. Specifically, the 2014 Law "repeals" only those prohibitions "to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older." N.J. Stat. Ann. § 5:12A-7. The 2014 Law additionally excludes "collegiate sport contest[s] or collegiate athletic event[s] that take[] place in New Jersey or . . . sport contest[s] or athletic event[s] in which any New Jersey college team participates regardless of where the event takes place" from the definition of "collegiate sport contest

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that the 2014 Law is in violation of PASPA. (State Defs.' Opp'n Br. 3, ECF No. 44.) Defendants rely on a Third Circuit case, *1st Westco Corp. v. School District of Philadelphia*, for the proposition that the Eleventh Amendment bars the Leagues' claim because suit against a state official may only be brought where "the official has either enforced, or threatened to enforce, the statute" in question. 6 F.3d 108, 113 (3d Cir. 1993) (citing *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988)). In *Westco*, the court, however, relied exclusively on another Third Circuit case, *Rode v. Dellarciprete*. In *Rode*, the court implicitly recognized an exception to the defendant-enforcement connection requirement, where the statute at issue is self-enforcing and thus no enforcement is required. 845 F.2d at 1208. Moreover, the statute at issue in Westco specifically placed enforcement in the hands of an entity other than the government official who was named as a defendant; accordingly, the court was primarily concerned with *the identity* of the state official being sued. 6 F.3d at 113. Thus, the Eleventh Amendment does not bar Plaintiffs' claim against the State Defendants.

or athletic event." *Id.* Defendants argue that this type of *partial repeal* is "[e]xpressly [a]uthorized [b]y [t]he Third Circuit's [d]ecision" in *Christie I*. (State Defs.' Opp'n Br. 15, ECF No. 44.) However, the court "must . . . identify the domain expressly pre-empted by [the] language" of PASPA. *Medtronic Inc.*, 518 U.S. at 484 (internal quotations omitted).

PASPA expressly states that it is unlawful for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. 28 U.S.C. § 3702(1). The Third Circuit, in *Christie I*, already held this language to be that of express preemption. Though this language "offers a starting point" in the preemption analysis, a court must still determine the scope and reach of the provision. *Bruesewitz*, 561 F.3d at 239.

Again, courts seeking to identify the scope of an express preemption provision are compelled to consider "[c]ongressional purpose [as] the 'ultimate touchstone' of [the] inquiry." *Lorillard Tobacco Co.*, 533 U.S. at 541 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)). In determining Congress's purpose, it is "appropriate to consider legislative history to resolve ambiguity in the scope of an express preemption provision." *Bruesewitz*, 561 F.3d at 244; *see also Cipollone*, 505 U.S. at 519 (citing language from a House of Representative report issued during Congress's consideration of the legislation); *Lorillard Tobacco Co.*, 533 U.S. at 542 (stating that the Court's task was to "identify the domain expressly pre-empted" and that this was aided "by considering the predecessor pre-emption provision and the circumstances in which the current language was adopted").

The Court is guided by the Third Circuit's determination of the congressional purpose of PASPA—" to ban gambling pursuant to a state scheme . . . because Congress was concerned that state-sponsored gambling carried with it a label of legitimacy that would make the activity appealing." *Christie I*, 730 F.3d at 237. In 1992, when Congress enacted PASPA, it was aware that all but one state had broad prohibitions on sports wagering. As the Third Circuit found, Congress sought to make it harder for states "to turn their backs on the choices they previously made." *Id.* at 234. Congress knew states, including New Jersey, were considering whether to allow some form of sports wagering and was concerned that the spread of sports wagering on "a piecemeal basis" would ultimately result in "an irreversible momentum" of sports wagering in the country. S. Rep. 102-248, at 5. In this Court's view, the Senate Report and the Third Circuit's finding of congressional purpose support the conclusion that PASPA preempts the type of *partial repeal* New Jersey is attempting to accomplish in the 2014 Law, by allowing some, but not all, types of sports wagering in New Jersey, thus creating a label of legitimacy for sports wagering pursuant to a state scheme.

This conclusion is supported by the two choices the Third Circuit held available to states under PASPA. The State Defendants argue that "Plaintiffs cannot now dismiss New Jersey's careful effort to stay on the repeal side of the dichotomy by asserting that there is no practical difference in effect between its repeal and authorization." (State Defs.' Opp'n Br. 18, ECF No. 44.) While the Third Circuit was focused primarily on anti-commandeering and not preemption,

this Court reads the Third Circuit's decision in *Christie I* to hold that anything outside of these "two choices" would leave states *too much room* to circumvent the ultimate intent of Congress.

In the context of a preemption analysis, federal courts have been unwilling to allow states to do indirectly what they may not do directly. "The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of [a] word," *Howlett v. Rose*, 496 U.S. 356, 382-83 (1990), nor can it "be evaded by formalism," which would only "provide a roadmap for States wishing to circumvent" federal law, *Haywood v. Drown*, 556 U.S. 729, 742 & n.9 (2009). *See also* 1A Sutherland Statutory Construction §22:1 (7th ed. 2009) ("For purposes of interpretation, an act's effect and not its form is controlling."); *cf. Aetna Health Inc. v. Davila*, 542 U.S. 200, 214-15 (2004) (holding a party may not evade federal preemption by elevating form over substance in connection with the naming of a cause of action).[13] To accept the State Defendants' argument, the Court would be allowing the 2014 Law to stand as a sufficient obstacle to accomplishing the full purpose and objective of Congress in enacting PASPA. While styled as a *partial repeal*, the 2014 Law would have the same primary effect of the 2012 Law—allowing sports wagering in New Jersey's casinos and racetracks for individuals age twenty-one and over but not on college sporting events that take place in New Jersey or on New Jersey college teams. This necessarily

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[13] "Abraham Lincoln once asked: If Congress said that a goat's tail was a leg, how many legs would a goat have? Four. Calling a tail a leg does not make it so." *City of Houston v. Am. Traffic Solutions, Inc.*, No. 10-4545, 2011 WL 2462670, at *3 (S.D. Tex. June 17, 2011).

results in sports wagering with the State's imprimatur, which goes against the very goal of PASPA—to ban sports wagering pursuant to a state scheme. The Third Circuit recognized that the choice PASPA left states might be a hard choice, but here New Jersey is not making that hard choice, and the Court cannot ignore Congress's intent in enacting PASPA just because New Jersey carefully styled the 2014 Law as a repeal.[14]

Moreover, in the preemption context, courts have looked to the *state* statute's legislative history as "an important source for determining whether a particular statute was motivated by an impermissible motive in the preemption context." *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 419 (2d Cir. 2013); *see also Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1251-53 (10th Cir. 2004); *Long Island Lighting Co. v. Cnty. of Suffolk, N.Y.*, 628 F. Supp. 654, 665-66 (E.D.N.Y. 1986); *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 145 (2d Cir. 2006). Over the last twenty years, New Jersey has changed course with regard to its policy on sports wagering and now wants to bring sports betting to New Jersey in a limited capacity. The 2014 Law was

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[14] Despite the New Jersey Legislature's wording, statutory interpretation principles indicate that the 2014 Law may be construed as an amendatory act rather than a repeal. See 1A Sutherland Statutory Construction §22:1 (7th ed. 2009) ("[A]ny change of the scope or effect of an existing statute, by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form, is treated as amendatory."). As a consequence, the State Defendants' attempt to fit the 2014 Law into one of the options left by the Third Circuit is even more attenuated.

passed in less than a week and provides no legislative history for the Court to examine. However, one of the 2014 Law's sponsors stated that he saw the legislation as "a short step away from getting this done and a lot closer to bringing sports betting to New Jersey." (Leagues' TRO Br., Dreyer Decl., Ex. 10, ECF No. 12-13 (quoting State Senator Raymond J. Lesniak).) A s noted above, the goal of PASPA is to "keep sports gambling from spreading" pursuant to a state scheme. S. Rep. 102-248, at 5; *see also Christie I*, 730 F.3d at 237. New Jersey's attempt to allow sport wagering in only a limited number of places, most of which currently house some type of highly regulated gambling by the State, coupled with New Jersey's history of attempts to circumvent PASPA, leads to the conclusion that the 2014 Law is in direct conflict with the purpose and goal of PASPA and is therefore preempted.

New Jersey's position on sports wagering is not unique. In fact, many states are currently rethinking their prohibitions on sports wagering. In *Christie I*, this Court indicated that it could not judge the wisdom of PASPA but only speak to PASPA's legality as a matter of constitutional law. The Third Circuit made a similar recognition in *Christie I*. The Court is yet again faced with similar constraints in *Christie II* and still may not judge the wisdom of PASPA. To the extent the people of New Jersey, or any state, disagree with PASPA, their primary remedy is through the repeal or amendment of PASPA in Congress.

For the foregoing reasons, this Court grants summary judgment for the Leagues on Count One of the

Complaint and holds that the 2014 Law is invalid as preempted by PASPA.[15]

D. Counts Two, Three, and Four of the Complaint

In their Complaint, the Leagues alternatively assert a claim against all Defendants that the 2014 Law is a violation of the New Jersey Constitution. The Leagues allege that if the 2014 Law is not a violation of PASPA, "then it violates Article IV, Section VII of the New Jersey Constitution" and is thus unlawful. (Compl. ¶ 64, ECF No. 1.)

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[15] The Legislature Defendants alternatively argue that if the Court "finds that a portion of the [2014 Law] is likely to violate PASPA, the Court must conduct the severability analysis to determine the proper scope of any injunction." (Legislature Defs.' Opp'n Br. 12 n.9, 12-4947, ECF No. 189.) "When a federal court is called upon to invalidate a state statute, the severability of the constitutional portions of the statute are governed by state law . . . ." *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1072 (3d Cir. 1994). The 2014 Law contains a broad severability clause. "Under New Jersey law, however, such a provision merely creates a presumption that the invalid sections of the [statute] are severable." *Old Coach Dev. Corp., Inc. v. Tanzman*, 881 F.2d 1227, 1234 (3d Cir. 1989) (citing *Inganamort v. Borough of Fort Lee*, 72 N.J. 412, 422 (1977)). The critical inquiry is "whether the legislature would have enacted the remaining sections of the statute without the objectionable part." *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1225 (D.N.J. 1981) (citation omitted). The New Jersey Legislature's intent has been clear: to permit gambling only at New Jersey racetracks and casinos for individuals age twenty-one and older, with the exception of wagering on college sporting events that take place in New Jersey or on New Jersey college teams. To sever the 2014 Law to provide for a complete repeal of all New Jersey's prohibitions on sports wagering would be to enact legislation never intended by its proponents.

The Court declines to entertain this claim. The Eleventh Amendment does not preclude suits against state officers for injunctive relief. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). The Supreme Court, however, made an exception to *Ex parte Young*, that state officers may not be sued on pendent state law claims. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121-22 (1984). In *Pennhurst*, the Supreme Court found that "when a plaintiff alleges that a state official has violated *state* law. . . . [a] federal court's grant of relief against state officials on the basis of state law . . . does not vindicate the supreme authority of federal law." *Id.* at 106. As a result, the Eleventh Amendment precludes the Leagues' claim against the State Defendants under the New Jersey Constitution.

Additionally, the Court is cognizant that not every Defendant is an agency or officer of the State; however, in accordance with 28 U.S.C. § 1367(c)(1), the Court, in its discretion, declines to exercise supplemental jurisdiction over the Leagues' alternative claim under the New Jersey Constitution.

The Leagues also assert claims against the NJSEA and the NJTHA for violation of PASPA. (Compl. ¶¶ 66-74, ECF No. 1.) The Leagues' claims against the NJSEA and the NJTHA are only for violation of PASPA *pursuant to* the 2014 Law. (*Id.* ¶¶ 68-69, 72, 74.) Accordingly, the preemption of the 2014 Law renders these claims moot.[16]

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[16] At oral argument, counsel for the Leagues acknowledged: "The last point I'd like to make on the merits concerns proposed sports gambling at Monmouth Park. Once again, you do not need

E. Permanent Injunction

Having determined that the 2014 Law is preempted and summary judgment for the Leagues on Count One of the Complaint is appropriate, the Court finds that the Leagues are also entitled to a permanent injunction against the State Defendants. As the Court reasoned in *Christie I*, it may be "debatable whether a separate showing for a permanent injunction is necessary where New Jersey is in clear violation of a valid federal statute"; however, "the Court is likely bound to enter the requested injunctive relief." *Christie I*, 926 F. Supp. 2d at 577 (citing *Markell*, 579 F.3d at 304). Accordingly, the Court will analyze the four factors necessary for an injunction. "This four factor test requires a demonstration: (1) of irreparable injury; (2) of inadequacy of remedies at law to compensate for said injury; (3) that a balance of the hardships favors the party seeking the injunction; and (4) that a permanent injunction would serve the public interest." *Id.* at 577-78 (citing *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)).

Similar to the Court's decision in *Christie I*, the Leagues have demonstrated the necessary factors for the Court to grant a permanent injunction. The Leagues have demonstrated irreparable harm in that the 2014 Law was enacted in violation of and is preempted by PASPA. This violation constitutes irreparable harm requiring the issuance of a permanent injunction, and there are no factual issues that need to be decided, contrary to the NJTHA's assertion at oral argument, to make a finding of irreparable harm

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to reach this issue to find that the 2014 Law violates PASPA." (Oral Arg. Tr. 14:2-5 Nov. 20, 2014.)

in this case. *See Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 622-23 (D.N.J. 2010), *order clarified* (Jan. 14, 2011), *aff'd sub nom., N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012); *Ass'n for Fairness in Bus., Inc. v. New Jersey*, 82 F. Supp. 2d 353, 363 (D.N.J. 2000) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm." (quoting *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997))). Additionally, under the Eleventh Amendment, a legal remedy is unavailable to the Leagues. *See Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir. 1991) ("As to the inadequacy of legal remedies, the Eleventh Amendment bar to an award of retroactive damages against the Commonwealth [of Pennsylvania] clearly establishes that any legal remedy is unavailable and that the only relief available is equitable in nature." (internal citation omitted)). While Defendants again make strong arguments in support of the 2014 Law as a policy matter, the grant of a permanent injunction will do nothing more than require the State Defendants to comply with federal law. *See Coach, Inc. v. Fashion Paradise, LLC*, No. 10-4888, 2012 WL 194092, at *9 (D.N.J. Jan. 20, 2012) ("The only hardship imposed upon the Defendants is that they obey the law."); *Port Drivers Fed'n 18, Inc. v. All Saints Express, Inc.*, 757 F. Supp. 2d 443, 461 (D.N.J. 2010). Lastly, the public interest factor weighs in favor of a permanent injunction by protecting and upholding the supremacy of valid federal law. *See Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) (affirming the district court's finding that "the public interest was not served by the enforcement of an unconstitutional law") (citation and

quotation marks omitted), *aff'd and remanded*, 542 U.S. 656 (2004).

Accordingly, the Court has found the 2014 Law to be invalid because it is preempted by PASPA, and the State Defendants are permanently enjoined from violating PASPA through giving operation or effect to the 2014 Law in its entirety.

V. Conclusion

After careful consideration of the parties' submissions and arguments, the Court has determined that the 2014 Law is invalid, under the Supremacy Clause of the United States Constitution, as preempted by PASPA. Therefore, summary judgment is GRANTED in favor of Plaintiffs on Count One of the Complaint. Plaintiffs have also demonstrated that they are entitled to a permanent injunction against the State Defendants. Counts Two, Three, and Four of the Complaint are DISMISSED as moot. An Order consistent with this Opinion will be filed on this date.

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Dated: November 21, 2014

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 12-4947 (MAS) (LHG) **ORDER**

This matter comes before the Court upon several motions filed by the Parties. The National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and Office of the Commissioner of Baseball doing business as Major League Baseball ("MLB") (collectively, "Plaintiffs" or "the Leagues") filed their Complaint on August 7, 2012. (Compl., ECF No. 1.) On August 10, 2012, Plaintiffs filed a "Motion for Summary Judgment and, If Necessary to Preserve the Status Quo, a Preliminary Injunction" seeking to enjoin Defendants Christopher J. Christie, Governor of the State of New Jersey, David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission (collectively, "Defendants" or the

"State"), from implementing N.J. Stat. Ann. 5:12A-1, *et seq.* (2012) ("New Jersey's Sports Wagering Law" or "Sports Wagering Law"). (Pls.' Mot. Summ. J., ECF No. 10.)

On November 21, 2012, Defendants filed a Cross Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment. (Defs.' Cross Mot. Summ. J., ECF No. 76.) On the same date, the New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA"), and Sheila Oliver and Stephen Sweeney ("Legislative Intervenors") filed Motions to Intervene, which included opposition to Plaintiffs' Summary Judgment Motion. (NJTHA's Mot. to Intervene, ECF No. 72; Legislative Intervenors' Mot. to Intervene, ECF No. 75.) NJTHA's and the Legislative Intervenors' Motions to Intervene were subsequently granted on December 11, 2012. (ECF No. 102.) The Leagues filed a Reply in support of their Motion for Summary Judgment, as well as Opposition to Defendants' Cross Motion, on December 7, 2012. (Pls.' Reply & Opp'n, ECF No. 95.) That submission included a request for a permanent injunction. (*Id.* at 20.)

On January 22, 2013, the United States filed a Notice of Intervention. (ECF No. 128.) The DOJ filed its brief on February 1, 2013. (DOJ's Br., ECF No. 136.) On February 8, 2013, NJTHA, Legislative Intervenors, and Defendants filed additional submissions in response to the DOJ's February 1, 2013 brief. (ECF Nos. 138, 139 and 140, respectively). The Court heard oral argument on the Cross Motions for Summary Judgment on February 14, 2013. (ECF No. 141.)

The Court, having considered the Parties' submissions, for the reasons stated in the Opinion filed on this date, and for other good cause shown,

IT IS on this 28th day of February, 2013, **ORDERED** that:

1) Plaintiffs' Motion for Summary Judgment (ECF No. 10) is **GRANTED**;

2) Plaintiffs' Request for a Permanent Injunction (ECF No. 95) is **GRANTED**; and

3) Defendants' Cross Motion for Summary Judgment (ECF No. 76) is **DENIED**.

/s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

APPENDIX F

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13-1713

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL;

UNITED STATES OF AMERICA (Intervenor in the District Court)

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; STEPHEN M. SWEENEY; SHEILA Y. OLIVER (Intervenors in District Court)

Stephen M. Sweeney and Sheila Y. Oliver,
Appellants

No. 13-1714

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL;

UNITED STATES OF AMERICA (Intervenor in the District Court)

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; STEPHEN M. SWEENEY; SHEILA Y. OLIVER (Intervenors in District Court)

New Jersey Thoroughbred Horsemen's Association, Inc.,
Appellant

No. 13-1715

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association;
NATIONAL BASKETBALL ASSOCIATION, a joint venture;
NATIONAL FOOTBALL LEAGUE, an unincorporated association;
NATIONAL HOCKEY LEAGUE, an unincorporated association;
OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL;

UNITED STATES OF AMERICA (Intervenor in the District Court)

v.

GOVERNOR OF THE STATE OF NEW JERSEY;
DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey;
FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; STEPHEN M. SWEENEY;
SHEILA Y. OLIVER (Intervenors in District Court)

Governor of the State of New Jersey; David L. Rebuck and Frank Zanzuccki,
Appellants

On Appeal from the United States District Court
for the District of New Jersey

(Civil Action No. 3-12-cv-04947)
District Judge: Hon. Michael A. Shipp

Argued: June 26, 2013

Before: FUENTES, FISHER, and VANASKIE, Circuit Judges.

(Opinion Filed: September 17, 2013)

* * *

OPINION OF THE COURT

FUENTES, Circuit Judge:

Betting on sports is an activity that has unarguably increased in popularity over the last several decades. Seeking to address instances of illegal sports wagering within its borders and to improve its economy, the State of New Jersey has sought to license gambling on certain professional and amateur sporting events. A conglomerate of sports leagues, displeased at the prospect of State-licensed gambling on their athletic contests, has sued to halt these efforts. They contend, alongside the United States as intervening plaintiff, that New Jersey's proposed law violates a federal law that prohibits most states from licensing sports gambling, the Professional and Amateur Sports Protection Act of 1992 (PASPA), 28 U.S.C. § 3701 *et seq.*

In defense of its own sports wagering law, New Jersey counters that the leagues lack standing to bring this case because they suffer no injury from the

State's legalization of wagering on the outcomes of their games. In addition, alongside certain intervening defendants, New Jersey argues that PASPA is beyond Congress' Commerce Clause powers to enact and that it violates two important principles that underlie our system of dual state and federal sovereignty: one known as the "anti-commandeering" doctrine, on the ground that PASPA impermissibly prohibits the states from enacting legislation to license sports gambling; the other known as the "equal sovereignty" principle, in that PASPA permits Nevada to license widespread sports gambling while banning other states from doing so. The District Court disagreed with each of these contentions, granted summary judgment to the leagues, and enjoined New Jersey from licensing sports betting.

On appeal, we conclude that the leagues have Article III standing to enforce PASPA and that PASPA is constitutional. As will be made clear, accepting New Jersey's arguments on the merits would require us to take several extraordinary steps, including: invalidating for the first time in our Circuit's jurisprudence a law under the anti-commandeering principle, a move even the United States Supreme Court has only twice made; expanding that principle to suspend commonplace operations of the Supremacy Clause over state activity contrary to federal laws; and making it harder for Congress to enact laws pursuant to the Commerce Clause if such laws affect some states differently than others.

We are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games' integrity and whether states

should be permitted to license and profit from the activity—engender strong views. But we are not asked to judge the wisdom of PASPA or of New Jersey's law, or of the desirability of the activities they seek to regulate. We speak only to the legality of these measures as a matter of constitutional law. Although this "case is made difficult by [Appellants'] strong arguments" in support of New Jersey's law as a policy matter, *see Gonzales v. Raich*, 545 U.S. 1, 9 (2005), our duty is to "say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803). "If two laws conflict with each other, the courts must decide on the operation of each." *Id.* New Jersey's sports wagering law conflicts with PASPA and, under our Constitution, must yield. We will affirm the District Court's judgment.

I. LEGAL FRAMEWORK

Wagering on sporting events is an activity almost as inscribed in our society as participating in or watching the sports themselves. New Jersey tells us that sports betting in the United States—most of it illegal—is a $500 billion dollar per year industry. And scandals involving the rigging of sporting contests in the interest of winning a wager are as old as the games themselves: the infamous Black Sox scandal of the 1919 World Series, or Major League Baseball's ("MLB") lifetime ban on all-time hits leader Pete Rose for allegedly wagering on games he played in come to mind. And the recent prosecution of Tim Donaghy, a National Basketball Association ("NBA") referee who bet on games that he officiated, reminds us of problems that may stem from gambling.

However, despite its pervasiveness, few states have ever licensed gambling on sporting events. Nevada alone began permitting widespread betting on sporting events in 1949 and just three other states—Delaware, Oregon, and Montana—have on occasion permitted limited types of lotteries tied to the outcome of sporting events, but never single-game betting. Sports wagering in all forms, particularly State-licensed wagering, is and has been illegal elsewhere. *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 5513; Del. Code Ann. tit. 11, § 1401, *et seq.* Congress took up and eventually enacted PASPA in 1992 in response to increased efforts by states to begin licensing the practice.

A. The Professional and Amateur Sports Protection Act of 1992

PASPA's key provision applies for the most part identically to "States" and "persons," providing that neither may

> sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702. The prohibition on private persons is limited to any such activity conducted "pursuant to the law or compact of a governmental entity," *id.* § 3702(2), while the states are subject to an additional restriction: they may not "license[] or authorize by law

or compact" any such gambling activities, *id.* §§ 3702(1), 3701.

PASPA contains three relevant exceptions—a "grandfathering" clause that releases Nevada from PASPA's grip, *see id.* § 3704(a)(2), a clause that permitted New Jersey to license sports wagering in Atlantic City had it chosen to do so within one year of PASPA's enactment, *see id.* § 3704(a)(3), and a grandfathering provision permitting states like Delaware and Oregon to continue the limited "sports lotteries" that they had previously conducted, *see id.* § 3704(a)(1). PASPA provides for a private right of action "to enjoin a violation [of the law] . . . by the Attorney General or by a . . . sports organization . . . whose competitive game is alleged to be the basis of such violation." *Id.* § 3703.

Only one Court of Appeals has decided a case under PASPA—ours. In *Office of the Commissioner of Baseball v. Markell* we held that PASPA did not permit Delaware to license single-game betting because the relevant grandfathering provision for Delaware permitted only lotteries consisting of multi-game parlays on NFL teams. 579 F.3d 293, 304 (3d Cir. 2009). This is the first case addressing PASPA's constitutionality.

The Act's legislative history is sparse but mostly consistent with the foregoing. The Report of the Senate Judiciary Committee makes clear that PASPA's purpose is to "prohibit sports gambling conducted by, or authorized under the law of, any State or governmental entity" and to "stop the spread of State-sponsored sports gambling." Sen. Rep. 102248, at 4, *re-*

printed in 1992 U.S.C.C.A.N. 3553, 3555 ("Senate Report"). The Senate Report specifically notes legislators' concern with "State-sponsored" and "State-sanctioned" sports gambling. *Id.* at 3555.

The Senate Report catalogues what the Committee believed were some of the problems arising from sports gambling. Importantly, the Committee noted its concern for "the integrity of, and public confidence in, amateur and professional sports" and its concern that "[w]idespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think 'the fix was in' whenever their team failed to beat the point-spread." *Id.* at 3556. The Senate Report also stated its concurrence with the then-director of New Jersey's Division of Gaming Enforcement's statement that "most law enforcement professionals agree that legalization has a negligible impact on, and in some ways enhances, illegal markets." *Id.* at 3558. This is so because "many new gamblers will . . . inevitably . . . seek to move beyond lotteries to wagers with higher stakes and more serious consequences." *Id.*

The Senate Report also explains the Committee's conclusion that "[s]ports gambling is a national problem" because "[t]he moral erosion it produces cannot be limited geographically" given the thousands who earn a livelihood from professional sports and the millions who are fans of them, and because "[o]nce a State legalizes sports gambling, it will be extremely difficult for other States to resist the lure." *Id.* at 3556. Finally, it notes that PASPA exempts Nevada because the Committee did not wish to "threaten [Nevada's] economy," or of the three other states that had chosen in

the past to enact limited forms of sports gambling. *Id.* at 3559.

B. Sports Gambling in New Jersey Since PASPA Was Enacted

Although New Jersey in its discretion chose not to avail itself of PASPA's exemption within the one-year window, "[o]ver the course of the next two decades . . . the views of the New Jersey voters regarding sports wagering evolved." Br. of Appellants Sweeney, *et al.* 4. In 2010, the New Jersey Legislature held public hearings during which it heard testimony that regulated sports gambling would generate much-needed revenues for the State's casinos and racetracks, and during which legislators expressed a desire to "to stanch the sports-wagering black market flourishing within [New Jersey's] borders." Br. of Appellants Christie, *et al.* 13 ("N.J. Br."). The Legislature ultimately decided to hold a referendum which would result in an amendment to the State's Constitution permitting the Legislature to "authorize by law wagering. . . on the results of any professional, college, or amateur sport or athletic event." N.J. Const. Art. IV, § VII, ¶ 2 (D), (F). The measure was approved by the voters, and the Legislature later enacted the law that is now asserted to be in violation of PASPA—the "Sports Wagering Law," which permits State authorities to license sports gambling in casinos and racetracks and casinos to operate "sports pools." N.J.S.A. 5:12A-1 *et seq.*; *see also* N.J.A.C. § 13:69N-1.1 *et seq.* (regulations implementing the law).

II. PROCEDURAL HISTORY

The NBA, MLB, the National Collegiate Athletic Association ("NCAA"), the National Football League

("NFL"), and the National Hockey League ("NHL") (collectively, the "Leagues"), sued New Jersey Governor Chris Christie, New Jersey's Racing Commissioner, and New Jersey's Director of Gaming Enforcement (the "State" or "New Jersey"), under 28 U.S.C. § 2703, asserting that the Sports Wagering Law is invalidated by PASPA. The New Jersey Senate Majority Leader Stephen Sweeney and House Speaker Sheila Oliver intervened as defendants, alongside the New Jersey Thoroughbred Horsemen's Association, the owner of the Monmouth Park Racetrack, a business where sports gambling would occur under the Sports Wagering Law (the "NJTHA") (collectively, "Appellants").

The State moved to dismiss for lack of standing and the District Court ordered expedited discovery on that question. After the completion of discovery and oral arguments, the District Court concluded that the Leagues have standing. *Nat'l Collegiate Athletic Ass'n v. Christie*, No. 12-4947, 2012 WL 6698684 (D.N.J. Dec. 21, 2012) ("*NCAA I*").

With the constitutionality of PASPA then squarely at issue, the District Court invited the United States to intervene pursuant to 28 U.S.C. § 2403. The District Court ultimately upheld PASPA's constitutionality, granted summary judgment to the Leagues, and enjoined the Sports Wagering Law from going into effect. *Nat'l Collegiate Athletic Ass'n v. Christie*, __ F. Supp. 2d __, 2013 WL 772679 (D.N.J. Feb. 28, 2013) ("*NCAA II*"). This expedited appeal followed.

III. JURISDICTION: WHETHER THE LEAGUES HAVE STANDING

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331, and we have appellate jurisdiction over its final judgment under § 1291. Our jurisdiction, however, is limited by the Constitution's "cases" and "controversies" requirement. U.S. CONST., art. III, § 2. To satisfy this jurisdictional limitation, the party invoking federal court authority must demonstrate that he or she has standing to bring the case.[1]

The Leagues argue they have standing because their own games are the subject of the Sports Wagering Law. They also contend that the law will increase the total amount of gambling on sports available, thereby souring the public's perception of the Leagues as people suspect that games are affected by individuals with a perhaps competing hidden monetary stake in their outcome. Appellants counter that the Leagues cannot show a concrete, non-speculative injury from any potential increase in *legal* gambling.

The District Court granted summary judgment to the Leagues, reasoning that *Markell* supports a holding that the Leagues have standing, and that reputational injury is a legally cognizable harm that may confer standing. It also found sufficient facts in the

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[1] The United States notes there may be questions as to whether the District Court's injunction is an appealable final order because it does not specify what steps the State must undertake to comply with the injunction, but we conclude that the injunction is an appealable final order because the merits opinion describes what the State must do refrain from licensing sports gambling. *See NCAA II*, 2013 WL 772679, at *25.

record to conclude that the Sports Wagering Law will result in an increase in fans' negative perceptions of the Leagues. We review *de novo* the legal conclusion that the Leagues have standing, and we review for clear error any factual findings underlying the District Court's determination. *Marion v. TDI Inc.*, 591 F.3d 137, 146 (3d Cir. 2010).

A. The Effect of *Markell*

Markell, like this case, was a lawsuit by the Leagues to stop a state from licensing single-game betting on the outcome of sporting events. In *Markell* we "beg[a]n [our analysis], as always, by considering whether we ha[d] jurisdiction to hear [the] appeal," and later concluded that we did have jurisdiction. 579 F.3d at 297, 300. But, contrary to the Leagues' suggestion, our analysis was limited to whether we had appellate jurisdiction under 28 U.S.C. § 1292(a). *See id.* We did not explicitly consider Article III standing, and a "drive-by jurisdictional ruling, in which jurisdiction has been assumed by the parties . . . does not create binding precedent." *United States v. Stoerr*, 695 F.3d 271, 277 n.5 (3d Cir. 2012) (internal quotation marks and alterations omitted). Therefore, we will not rely on *Markell* for our standing analysis.

B. Standing Law Generally

Under the familiar three-part test, to establish standing, a plaintiff must show (1) an "injury in fact," *i.e.*, an actual or imminently threatened injury that is "concrete and particularized" to the plaintiff; (2) causation, *i.e.*, traceability of the injury to the actions of the defendant; and (3) redressability of the injury by a favorable decision by the Court. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

Causation and redressability may be met when "a party . . . challenge[s] government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940-41 (D.C. Cir. 2004). Here, the Leagues do not purport to enjoin third parties from attempting to fix games. The Leagues have sued to block the Sports Wagering Law, which they assert will result in a taint upon their games, and is a law that by definition constitutes state action to license conduct that would not otherwise occur. Under the reasoning of *National Wrestling Coaches*, causation and redressability are thus satisfied, and all arguments implicitly aimed at those two prongs are suspect.

Accordingly, we focus on the injury-in-fact requirement, the "contours of [which], while not precisely defined, are very generous." *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982). Indeed, all that Article III requires is an identifiable trifle of injury, *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 n.14 (1973), which may exist if the plaintiff "has . . . a personal stake in the outcome of [the] litigation." *The Pitt News v. Fisher*, 215 F.3d 354, 360 (3d Cir. 2000); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992) (noting that to satisfy the injury-in-fact requirement the "injury must affect the plaintiff in a personal and individual way"). To meet this burden, the Leagues must present evidence "in the same way as [for] any other matter on which [they] bear[] the burden of proof." *Lujan*, 504 U.S. at 561.

C. Whether the Sports Wagering Law Causes the Leagues An Injury In Fact

As noted, the Leagues offer two independent bases for standing: that the Sports Wagering Law makes the Leagues' games the object of state-licensed gambling and that they will suffer reputational harm if such activity expands. We address each in turn.

1. The Leagues are essentially the object of the Sports Wagering Law

Injury in fact may be established when the plaintiff himself is the object of the action at issue. *Id.* Thus, the Leagues are correct that if the Sports Wagering Law is directed at them, the injury-in-fact requirement is satisfied.

Fairly read, however, the Sports Wagering Law does not directly regulate the Leagues, but instead regulates the activities that may occur at the State's casinos and racetracks. We thus hesitate to conclude that the Leagues may rely solely on the existence of the Sports Wagering Law to show injury. But that is not to say that we are glib with respect to one of the main purposes of the law: to use the Leagues' games for profit. *Cf. NFL v. Governor of Del.*, 435 F. Supp. 1372, 1378 (D. Del. 1972) (Stapleton, J.) (explaining that Delaware's sports lottery sought to use the NFL's "schedules, scores and public popularity" to "mak[e] profits [Delaware] [c]ould not make but for the existence of the NFL"). The Sports Wagering Law is thus, in a sense, as much directed at the Leagues' events as it is aimed at the casinos. This is not a generalized grievance like those asserted by environmental groups over regulation of wildlife in cases where the Supreme Court has found no standing, such as in

Lujan or *Summers*. The law here aims to license private individuals to cultivate the fruits of the Leagues' labor.

Appellants counter that the Leagues' interest in not seeing their games subject to wagering is a non-cognizable "claim for the loss of psychic satisfaction." N.J. Br. at 31 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998)). But the holding in *Steel Company* was that a claim for psychic satisfaction did not present a *redressable* injury. In that case, a private plaintiff sought a payment into the U.S. Treasury by a private company that had violated federal law, and asserted that such was a redressable injury because the plaintiff would feel "psychic satisfaction" in seeing the payment made. *See Steel Co.*, 523 U.S. at 107. The case is thus inapposite here, where redressability is established because the Leagues assert harm from the very government action they seek to enjoin—the enforcement of the Sports Wagering Law. Moreover, the Leagues do not assert merely psychic, but reputational harm, a very real and very redressable injury.

Appellants also argue that because the Leagues do not have a proprietary interest in the outcomes of their games they may not seek to prevent others from profiting from them. This contention relies on the holding in *NFL v. Governor of Delaware*, that a Delaware lottery based on the outcome of NFL games did not constitute a misappropriation of the NFL's property. 435 F. Supp. at 1378-79. But here the Leagues do not complain of an invasion of any proprietary interest, but only refer to the fact of appropriation of their labor to show that the Sports Wagering Law is directed at them.

2. Reputational Harm as Injury In Fact

The Leagues may also meet their burden of establishing injury from a law aimed at their games by proving that the activity sanctioned by that law threatens to cause them reputational harm amongst their fans and the public.

(a) Reputation Harm Is a Legally Cognizable Injury

As a matter of law, reputational harm is a cognizable injury in fact. The Supreme Court so held in *Meese v. Keene*, where it concluded that a senator who wished to screen films produced by a foreign company had standing to challenge a law requiring the identification of such films as foreign "political propaganda" because the label could harm his reputation with the public and hurt his chances at reelection. 481 U.S. 465, 473-74 (1987). Essentially, the senator challenged his unwanted association with an undesirable label. Our cases have also recognized that reputational harm is an injury sufficient to confer standing. *See, e.g.*, *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-43 (3d Cir. 2007) (concluding that an attorney has standing to challenge a public reprimand because the sanction "affect[s] [his] reputation"); *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (holding that a student had standing to challenge a rule requiring that he be identified as disabled because such label could sour the perception of him by "people who can affect his future and his livelihood").

The Leagues' claim of injury is identical to that of the plaintiffs in *Keene* and *Doe*: they are harmed by their unwanted association with an activity they (and

large portions of the public) disapprove of—gambling. Appellants do not dispute this legal premise, but attack the strength of the evidence that the Leagues have proffered to tie the Sports Wagering Law to the reputational harm they assert. These arguments overstate what the Leagues must show to demonstrate reputational harm in this context and, in any case, ignore the strength of the proffered evidence.

(b) The Evidence In the Record Supports the District Court's Conclusion that Reputational Harm Will Occur

To be sure, at the summary judgment stage, mere allegations of harm are insufficient and specific facts are required. *See Lujan*, 504 U.S. at 561. And a plaintiff's claim of fear of reputational harm must always be "based in reality." *Doe*, 199 F.3d at 153. But the "nature and extent of facts that must be averred" depends on the nature of the asserted injury. *Lujan*, 504 U.S. at 561-62. No one would doubt, for example, that an individual forced to wear a scarlet "A" on her clothing has standing to challenge that action based on reputational harm. Indeed, that was the import of our holding in *Doe* where, after discounting all of the evidence presented to prove that others' perception of the plaintiff as disabled could harm him, we concluded that his fear of reputational harm based on an unwanted and stigmatizing label was nevertheless based "in reality." 199 F.3d at 153. In *Keene*, by contrast, where the reputational harm from being associated with "foreign political propaganda" was not as intuitive, the Supreme Court held that an undisputed expert opinion that such labels may stigmatize individuals was sufficient to make the required injury-in-

fact showing. 481 U.S. at 490. This suggests a spectrum wherein the sufficiency of the showing that must be made to establish reputational harm depends on the circumstances of each case. Here, the reputational harm that results from increasingly associating the Leagues' games with gambling is fairly intuitive.

For one, the conclusion that there is a link between legalizing sports gambling and harm to the integrity of the Leagues' games has been reached by several Congresses that have passed laws addressing gambling and sports, *see, e.g.*, H.R. Rep. No. 88-1053 (1963) (noting that when gambling interests are involved, the "temptation to fix games has become very great," which in turn harms the honesty of the games); Senate Report at 3555 (noting that PASPA was necessary to "maintain the integrity of our national pastime"). It is, indeed, the specific conclusion reached by the Congress that enacted PASPA, as reflected by the statutory cause of action conferred to the Leagues to enforce the law when their individual games are the target of state-licensed sports wagering. *See* 28 U.S.C. § 3703. And, presumably, it has also been at least part of the conclusions of the various state legislatures that have blocked the practice throughout our history.

But even if polls like in *Keene* were always required in reputational harm cases, the Leagues have met that burden. The record is replete with evidence showing that being associated with gambling is stigmatizing, regardless of whether the gambling is legal or illegal. Before the District Court were studies showing that: (1) some fans from each League viewed gambling as a problem area for the Leagues, and some fans expressed their belief that game fixing most threatened the Leagues' integrity **[App. 1605-06]**; (2)

some fans did not want a professional sports franchise to open in Las Vegas, and some fans would be less likely to spend money on the Leagues if that occurred; and (3) a large number of fans oppose the expansion of legalized sports betting. [**2293-98.**] This more than suffices to meet the Leagues' evidentiary burden under *Keene* and *Doe*—being associated with gambling is undesirable and harmful to one's reputation.

Although the Leagues could end their injury in fact proffer there, they also set forth evidence establishing a clear link between the Sports Wagering Law and increased incentives for game-rigging. First, the State's own expert noted that state-licensing of sports gambling will result in an increase in the total amount of (legal plus illegal) gambling on sports. **[App. 325].** Second, a report by the National Gambling Impact Study Commission, prepared at the behest of Congress in 1999, explains that athletes are "often tempted to bet on contests in which they participate, undermining the integrity of sporting contests." App. 743. Third, there has been at least one instance of match-fixing for NCAA games as a result of wagers placed through legitimate channels, and several as a result of wagers placed in illegal markets for most of the Leagues, and NCAA players have affected or have been asked to affect the outcome of games "because of gambling debt." App. 2245. Thus, more legal gambling leads to more total gambling, which in turn leads to an increased incentive to fix or attempt to fix the Leagues' matches.

This evidence, together, permits the factual conclusion that being associated with gambling is a stigmatizing label and that, to the extent that the Sports

Wagering Law will increase the total amount of gambling as New Jersey's expert expects, it will increase some fans' "negative perceptions [of the Leagues] attributed to game fixing and gambling." *NCAA I*, 2013 WL 6698684, at *6. We discern no clear error in the District Court's factual conclusions as derived from these surveys and reports.[2]

3. Appellants' Counterarguments

Appellants posit that the Leagues cannot establish injury based on any stigma that may attach to wagering, because fans would not think negatively of the Leagues given that it is the State that is licensing the activity against the Leagues' wishes. But as then-Circuit Judge Scalia explained, an argument that the "public reaction [to] the alleged harm . . . is an irrational one . . . is irrelevant to the question of core, constitutional injury-in-fact, which requires no more than *de facto* causality." *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986).

We also find unpersuasive the contention that the increase in incentives to rig the outcome of the Leagues' games cannot give rise to standing because they depend on unknown actions of third parties. The

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[2] More fundamentally, it is clear to us that gambling and match-fixing scandals tend to tarnish the Leagues' reputations. Media reports to that effect abound. To take but one, after the Tim Donaghy NBA gambling and game-fixing scandal, commentators noted that "the integrity of the [NBA's] games just took a major hit." J.A. Adande, *Ref investigation only adds to bad perception of NBA*, ESPN.com, July 19, 2007, http://sports.espn.go.com/nba/columns/story?id=2943704. It is simply untenable to hold that the Leagues have not identified a trifle of reputational harm from an increase in even legal or licensed sports gambling.

Leagues do not seek to enjoin individuals from rigging games; they seek to enjoin New Jersey's law. That a third party's action may be necessary to complete the complained-of harm does not negate the existence of an injury in fact from the Sports Wagering Law or negate causation and redressability. "It is impossible to maintain . . . that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third persons. If that principle were true, it is difficult to see how libel actions or suits for inducing breach of contract could be brought in federal court. . . ." *Id.* Thus, "the traceability requirement [may be] met even where the conduct in question might not have been a proximate cause of the harm." *Edmonson v. Lincoln Nat'l Life Ins. Co.*, __ F.3d __, No. 12-1581, 2013 WL 4007553, *7 (3d Cir. Aug. 7, 2013) (citing *The Pitt News*, 215 F.3d at 360-61).[3]

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[3] Appellants rely almost exclusively on *Simon v. East Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), for the proposition that the reputational injury at issue here is insufficient because it "result[s] 'from the independent action of some third party not before the court.'" N.J. Br. at 23 (quoting *Simon*, 426 U.S. at 41-42). This argument greatly overstates the effect of *Simon*. There, a group of indigent individuals brought suit against the IRS, asserting that the IRS's tax designation of certain hospitals harmed them by making it less likely that the hospitals would provide them free services. The Supreme Court concluded that the plaintiffs lacked standing because it was "purely speculative whether the denials of services . . . fairly can be traced to [the IRS' actions] or instead result from decisions made by the hospitals without regard to the tax implications." *Simon*, 426 U.S. at 42-43. But here we are dealing with a law that licenses conduct that casinos could not otherwise undertake under the State's auspices, and thus the third party's actions are not

Appellants also assert that granting summary judgment to the Leagues was improper because the effect of the studies and opinion polls was disputed by Appellants' own evidence. In particular, they point to evidence that (1) the Leagues have been economically prospering despite pervasive unregulated sports gambling and state-licensed sports gambling in Nevada; and (2) some individuals would have no interest in the Leagues' product unless they had a monetary interest in the outcome of games. But these arguments, which sound more like an appeal to commonsense with which, no doubt, many will agree as a policy matter, do not legally deprive the Leagues of standing and are insufficient to raise a genuine issue of material fact.

A plaintiff does not lose standing to challenge an otherwise injurious action simply because he may also derive some benefit from it. Our standing analysis is not an accounting exercise and it does not require a decision on the merits. *See, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006) (noting that "the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing"); *see also* 13A CHARLES A. WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. JURIS. 3d § 3531.4, 147 (3d ed. 2008). Nor must the Leagues construct counterfactuals analyzing whether they would have done better if PASPA had instituted a complete ban of state-licensed sports gambling or, conversely, worse if PASPA had not existed. And that fans may still buy tickets is not incon-

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truly independent of the State's conduct. *See Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 941.

sistent with the notion that the Leagues' esteem suffers in the eyes of fans, which requires the Leagues to take efforts to rehabilitate their image. That alone establishes injury in fact; that the Leagues may have been successful at rehabilitating their images does not deprive them of standing. *See, e.g.*, *Keene*, 481 U.S. at 475 ("[T]he need to take . . . affirmative steps to avoid the risk of harm to [one's] reputation constitutes a cognizable injury.").

As a last resort, Appellants question the Leagues' commitment to their own argument that state-licensed sports wagering harms them, noting that the Leagues hold events in jurisdictions, such as Canada and England, where gambling on sports is licensed, and that they promote and profit from products that are akin to gambling on sports, such as pay-to-play fantasy leagues. But standing is not defeated by a plaintiff's alleged unclean hands and does not require balancing the equities. That the Leagues may believe that holding events in Canada and England is not injurious to them does not negate that harm may arise from an expansion of sports wagering to the entire country. The same can be said of the Leagues' promotion of fantasy sports, even if we accept that these activities are akin to head-to-head gambling.[4] And, as

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[4] We note, however, the legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the Sports Wagering Law. *See Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at *9 (D.N.J. June 20, 2007) (holding that fantasy leagues that require an entry fee are not subject to anti-betting and wagering laws); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86-87 (Nev. 1961) (holding that a "hole-in-one" contest that required an entry fee was a prize contest, not a wager).

even Appellants recognize, it is not the Leagues' subjective beliefs that control. *See Lujan*, 504 U.S. at 564.

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That the Leagues have standing to enforce a prohibition on state-licensed gambling on their athletic contests seems to us a straightforward conclusion, particularly given the proven stigmatizing effect of having sporting contests associated with gambling, a link that is confirmed by commonsense and Congress' own conclusions.[5]

IV. THE MERITS

We turn now to the merits. The centerpiece of Appellants and amici's attack on PASPA is that it impermissibly commandeers the states. But at least one party raises the spectre that PASPA is also beyond Congress' authority under the Commerce Clause of the U.S. Constitution. We thus examine first whether Congress may even regulate the activities that PASPA governs. Only after concluding that Congress may do so can we consider whether, in exercising its affirmative powers, Congress exceed a limitation imposed in the Constitution, such as by the anti-commandeering and equal sovereignty principles. *See,*

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[5] We also note that, although the United States' intervention does not always give us jurisdiction, a court may treat intervention as a separate suit over which it has jurisdiction, if the intervenor has standing, particularly when the intervenor enters the proceedings at an early stage. *See, e.g., Disability Advocates, Inc. v. New York Coal. For Assisted Living, Inc.*, 675 F.3d 149, 161 (2d Cir. 2012); *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965). Thus, the United States' intervention independently supports our jurisdiction.

e.g., *Reno v. Condon*, 528 U.S. 141, 148-49 (2000) (asking, first, whether a law was within Commerce Clause powers and, second, whether the law violated the Tenth Amendment).[6]

A. Whether PASPA is Within Congress' Commerce Clause Power

1. Modern Commerce Clause Law

Among Congress' enumerated powers in Article I is the ability to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., Art. I., § 8, cl. 3. As is well-known, since *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937), the Commerce Clause has been construed to give Congress "considerabl[e] . . . latitude in regulating conduct and transactions." *United States v. Morrison*, 529 U.S. 598, 608 (2000). For one, Congress may regulate an activity that "substantially affects interstate commerce" if it "arise[s] out of or [is] connected with a commercial transaction." *United States v. Lopez*, 514 U.S. 549, 559 (1995). By contrast, regulations of non-economic activity are disfavored. *Id.* at 567 (striking down a law regulating possession of weapons near schools); *see also Morrison*, 529 U.S. at 613 (invalidating a law regulating gender-motivated violence).

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[6] We review *de novo* a determination regarding PASPA's constitutionality, *Gov't of V.I. v. Steven*, 134 F.3d 526, 527 (3d Cir. 1998), and begin with the "time-honored presumption that [an act of Congress] is a constitutional exercise of legislative power." *Reno*, 528 U.S. at 148 (internal quotation marks omitted) (quoting *Close v. Glenwood Cemetery*, 107 U.S. 446, 475 (1883)).

2. Gambling and the Leagues' Contests, Considered Separately or Together, Substantially Affect Interstate Commerce

Guided by these principles, it is self-evident that the activity PASPA targets, state-licensed wagering on sports, may be regulated consistent with the Commerce Clause.

First, both wagering and national sports are economic activities. A wager is simply a contingent contract involving "two or more . . . parties, having mutual rights in respect to the money or other thing wagered." *Gibson*, 359 P.2d at 86; *see also* N.J. Stat. Ann. §§ 5:12-21 (defining gambling as engaging in a game "for money, property, checks, or any representative of value"). There can also be no doubt that the operations of the Leagues are economic activities, as they preside essentially over for-profit entertainment. *See, e.g.*, App. 1444 (NFL self-describing its "complex business model that includes a diverse range of revenue streams, which contribute . . . to company profitability").

Second, there can be no serious dispute that the professional and amateur sporting events at the heart of the Leagues' operations "substantially affect" interstate commerce. The Leagues are associations comprised of thousands of clubs and members, **[App. 105]**, which in turn govern the operations of thousands of sports teams organized across the United States, competing for fans and revenue across the country. "Thousands of Americans earn a . . . livelihood in professional sports. Tens of thousands of others participate in college sports." Senate Report at 3557. Indeed, some of the Leagues hold sporting

events abroad, affecting commerce with Foreign Nations.

Third, it immediately follows that placing wagers on sporting events also substantially affects interstate commerce. As New Jersey indicates, Americans gamble up to $500 billion on sports each year. **[App. 330-31].** And whatever effects gambling on sports may have on the games themselves, those effects will plainly transcend state boundaries and affect a fundamentally national industry. Accordingly, we have deferred to Congressional determinations that "gambling involves the use and has an effect upon interstate commerce." *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972).

At bottom, it is clear that PASPA is aimed at an activity that is "quintessentially economic" and that has substantial effects on interstate commerce. *See Raich*, 545 U.S. at 19-20. Prohibiting the state licensing of this activity is thus a "rational . . . means of regulating commerce" in this area and within Congress' power under the Commerce Clause. *Id.* at 26.[7]

3. PASPA Does Not Unconstitutionally Regulate Purely Local Activities

Appellants nevertheless assert that PASPA is unconstitutional because it "reaches unlimited betting activity . . . that cannot possibly affect interstate commerce . . . [such as] a casual bet on a Giants-Jets football game between family members." Br. of NJTHA at

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[7] *But see Federal Baseball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200, 208-09 (1922) (describing MLB's business as "giving exhibitions of base ball, which are purely state affairs," and concluding that baseball is not in interstate commerce for purposes of the Sherman Antitrust Act).

34. Parsing words from the statute, they insist PASPA reaches these activities because it prohibits betting in "competitive games" involving "amateur or professional athletes." 28 U.S.C. § 3702. This argument is meritless.

For one, PASPA on its face does not reach the intrastate activities that Appellants contend it does. PASPA prohibits only gambling "schemes" and only those carried out "pursuant to law or compact." 28 U.S.C. § 3702. The activities described in Appellants' examples are nor carried out pursuant to state law, or pursuant to "a systemic plan; a connected or orderly arrangement . . . [or] [a]n artful plot or plan." Black's Law Dictionary (9th Ed. 2009) (defining "scheme").

Moreover, even entertaining that PASPA somehow reaches these activities, Congressional action over them is permissible if Congress has a "rational basis" for concluding that the activity in the aggregate has a substantial effect on interstate commerce. *Raich*, 545 U.S. at 22. The rule of an unbroken line from *Wickard v. Filburn*, 317 U.S. 111 (1942), to *Raich*—respectively upholding limitations on growing wheat at home and personal marijuana consumption—is that when it comes to legislating economic activity, Congress can regulate "even activity that is purely intrastate in character . . . where the activity, combined with like conduct by other similarly situated, affects commerce among the States or with foreign nations." *Nat'l League of Cities v. Usery*, 426 U.S. 833, 840 (1976), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (alterations omitted). And there can be no doubt that Congress had a rational basis to conclude

that the intrastate activities at issue substantially affect interstate commerce, given the reach of gambling, sports, and sports wagering into the far corners of the economies of the states, documented above.[8]

Appellants finally seek support in the Supreme Court's holding that the "individual mandate" of the Affordable Care Act is beyond Congress' power under the Commerce Clause. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). But the problem in *Sebelius* was that the *method* chosen to regulate (forcing into economic activity individuals previously not in the market for health insurance) was beyond Congress' power. Here, the method of regulation, banning an activity altogether (in this case the expansion of State-sponsored sports betting), is neither novel nor problematic. *See, e.g.*, *Raich*, 545 U.S. at 27.

B. Whether PASPA Impermissibly Commandeers the States

Having concluded that Congress may regulate sports wagering consistent with the Commerce

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[8] Moreover, if PASPA reaching activities that are purely intrastate in nature were constitutionally problematic, we would construe its language as not reaching such acts. After all, "[t]he cardinal principle of statutory construction is to save and not to destroy . . . . [A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." *Jones & Laughlin Steel*, 301 U.S. at 30. Appellants' reading of PASPA to reach casual bets between friends steamrolls that principle. At the very worst, we would leave for another day the question of whether PASPA may constitutionally be applied to such a local wager. Appellants today have not shown that "no set of circumstances exists under which the [challenged] Act would be valid." *CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 623 (3d Cir. 2013) (alteration in original).

Clause, we turn to PASPA's operation in the case before us.

As noted, PASPA makes it "unlawful for a governmental entity to . . . authorize by law or compact" gambling on sports. 28 U.S.C. § 3702. This is classic preemption language that operates, via the Constitution's Supremacy Clause, *see* U.S. CONST., art. VI, cl. 2, to invalidate state laws that are contrary to the federal statute. *See, e.g., Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096, 2100-01, 2102 (2013) (explaining that the provision of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") that states a "'State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property' . . . preempts State laws related to a price, route, or service of any motor carrier with respect to the transportation of property" (quoting 49 U.S.C. § 14501(c)(1)). The Sports Wagering Law is precisely what PASPA says the states may not do—a purported authorization by law of sports wagering. It is therefore invalidated by PASPA.[9]

Appellants do not contest any of the foregoing, but argue instead that PASPA's operation over the Sports Wagering Law violates the "anti-commandeering" principle, which bars Congress from conscripting the states into doing the work of federal officials. The import of this argument, then, is that impermissible

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[9] This straightforward operation of the Supremacy Clause, which operates on states laws that are foreclosed by a standalone federal provision, is not to be confused with *field preemption* of sports wagering, a topic we discuss at part IV.B.2.d below.

anti-commandeering may occur even when all a federal law does is supersede state law via the Supremacy Clause. But the Supreme Court's anti-commandeering jurisprudence has never entertained this position, let alone accepted it.

1. The Anti-Commandeering Principle

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). And it is well-known that all powers not explicitly conferred to the federal government are reserved to the states, a maxim reflected in the text of the Tenth Amendment. U.S. CONST., amdt. X; *see also United States v. Darby*, 312 U.S. 100, 123-24 (1941) (describing this as a "truism" embodied by the Tenth Amendment).

Among the important corollaries that flow from the foregoing is that any law that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" is beyond the inherent limitations on federal power within our dual system. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 283, 288 (1981). Stated differently, Congress "lacks the power directly to compel the States to require or prohibit" acts which Congress itself may require or prohibit. *New York v. United States*, 505 U.S. 144, 166, 180 (1992). The Supreme Court has struck down laws based on these principles on only two occasions, both distinguishable from PASPA.

(a) Permissible regulation in a preemptible field: *Hodel* and *FERC*

The first modern, relevant incarnation of the anti-commandeering principle appeared in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*. The law at issue there imposed federal standards for coal mining on certain surfaces and required any state that wished to "assume permanent regulatory authority over . . . surface coal mining operations" to "submit a proposed permanent program" to the Federal Government, which, among other things, required the "state legislature [to] enact[] laws implementing the environmental protection standards established by the [a]ct." *Hodel*, 452 U.S. at 271. If a particular state did *not* wish to implement the federal standards, the federal government would step in to do so. *Id.* at 272. The Supreme Court upheld the provisions, noting that they neither compelled the states to adopt the federal standards, nor required them "to expend any state funds," nor coerced them into "participat[ing] in the federal regulatory program in any manner whatsoever." *Id.* at 288. The Court further concluded that Congress could have chosen to completely preempt the field by simply assuming oversight of the regulations itself. *Id.* It thus held that the Tenth Amendment posed no obstacle to a system by which Congress "chose to allow the States a regulatory role." *Id.* at 290. As the Court later characterized *Hodel*, the scheme there did not violate the anti-commandeering principle because it "merely made compliance with federal standards a precondition to continued state regulation in an otherwise preempted field." *Printz v. United States*, 521 U.S. 898, 926 (1997).

The next year, in *F.E.R.C. v. Mississippi*, the Court upheld a provision *requiring* state utility regulatory commissions to "consider" whether to enact certain standards for energy efficiency but leaving to the states the ultimate choice of whether to adopt those standards or not. 456 U.S. 742, 746, 769-70 (1982). The Court upheld the law despite its outright commandeering of the state resources needed to consider and study the federal standards, because the law did not definitely require the enactment or implementation of federal standards. *Id.* at 764. The Court, noting that Congress had simply regulated where it could have "preempt[ed] the States entirely" but instead chose to leave some room for the states to maneuver, saw the case as "only one step beyond *Hodel*." *Id.*

(b) Permissible Prohibitions on State Action: *Baker* and *Reno*

In a different pair of anti-commandeering cases, the Court upheld affirmative prohibitions on state action that effectively invalidated contrary state laws and even required the states to enact new measures. First, in *South Carolina v. Baker*, the Supreme Court upheld the validity of laws that "directly regulated the States by prohibiting outright the issuance of bearer bonds." 485 U.S. 505, 511 (1988). These rules, which also applied to private debt issuers, required the states to "amend a substantial number of statutes in order to [comply]." *Id.* at 514. The Court concluded this result did not run afoul the Tenth Amendment because it did not "seek to control or influence the manner in which States regulate private parties" but was simply "an inevitable consequence of regulating a state activity," *id.* In subsequent cases, the Court explained that the regulation in *Baker* was permissible

because it simply "subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160.

Then, in *Reno v. Condon*, the Court unanimously rejected an anti-commandeering challenge to a law prohibiting states from disseminating personal information obtained by state departments of motor vehicles. South Carolina complained that the act required its employees to learn its provisions and expend resources to comply and, indeed, the federal law effectively blocked the operation of state laws governing the disclosure of that information. 528 U.S. at 150. The Court agreed "that the [act] will require time and effort on the part of state employees" but otherwise rejected the anti-commandeering challenge because, like the law in *Baker*, the law "d[id] not require the States in their sovereign capacity to regulate their own citizens[,] . . . d[id] not require the [State] Legislature[s] to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151. Moreover, the law did not "seek to control[] or influence the manner in which States regulate private parties." *Id.* (citing *Baker*, 485 U.S. at 514-15).

(c) Impermissible Anti-Commandeering: *New York* and *Printz*

In contrast to the foregoing, the Court has twice struck down portions of a federal law on anti-commandeering grounds. The first was in *New York v. United States*, which dealt with a law meant to regulate and encourage the orderly disposal of low-level radioactive waste by the states. 505 U.S. at 149-54. The "most severe" aspect of the complex system of measures established by the law, referred to as the "take-title"

provision, provided that if a particular state had not been able to arrange for the disposal of the radioactive waste by a specified date, then that state would have to take title to the waste at the request of the waste's generator. *Id.* at 153-54 (citing 42 U.S.C. § 2021e(d)(2)(C)). The Court, based on the notion that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,'" *id.* at 161 (quoting *Hodel*, 452 U.S. at 288) (alterations omitted), struck down the take-title provision because it did just that: compel the states to either enact a regulatory program, or expend resources in taking title to the waste. *Id.* at 176. The Court noted that Congress may enact measures to encourage the states to act and may "hav[e] state law pre-empted by federal regulation" but concluded that the take-title provision "crossed the line distinguishing encouragement from coercion." *Id.* at 167, 175. The Court also emphasized that the anti-commandeering principle was designed, in part, to stop Congress from blurring the line of accountability between federal and state officials and from skirting responsibility for its choices by foisting them on the states. *Id.* at 168.

The Court then applied these principles, in *Printz*, to invalidate the provisions of the Brady Act that required local authorities of certain states to run background checks on persons seeking to purchase guns. The Court held that Congress "may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program." 521 U.S. at 935. The Court was also troubled that these provisions required states to "absorb the financial

burden of implementing a federal regulatory program" and "tak[e] the blame for its . . . defects." *Id.* at 930.

To date, the schemes at issue in *New York* and *Printz* remain the only two that the Supreme Court has struck down under the anti-commandeering doctrine. Our Court has not yet had occasion to consider an anti-commandeering challenge.[10]

2. Whether PASPA Violates the Anti-Commandeering Principle

(a) Anti-Commandeering and the Supremacy Clause

Appellants' arguments that PASPA violates anti-commandeering principles run into an immediate problem: not a single case that we have reviewed involved a federal law that, like PASPA, simply operated to invalidate contrary state laws. It has thus never been the case that applying the Supremacy Clause to invalidate a state law contrary to federal proscriptions is tantamount to direct regulation over the states, to an invasion of their sovereignty, or to commandeering. Most of the foregoing cases involved Congress attempting to directly impose a federal scheme on state officials. If anything, the federal laws

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[10] Three other cases complete the constellation of the Supreme Court's modern anti-commandeering jurisprudence but deal with the applicability of federal labor laws to certain State employees. *See Nat'l League of Cities*, 426 U.S. at 883; *Garcia*, 469 U.S. at 528; *Gregory*, 501 U.S. at 452. These cases are of marginal relevance, so we do not elaborate on them at length. *See also Markell*, 579 F.3d at 303 (rejecting an argument that PASPA violates the sovereignty principles set forth in *Gregory*).

in *Reno* and *Baker* had the effect of invalidating certain contrary state laws by prohibiting state action, and both survived. Indeed, the Justices in both *New York* and *Printz* disclaimed any notion that the anti-commandeering principle somehow suspends the operation of the Supremacy Clause on otherwise valid laws. For example, in *Printz* the Court explained that our Constitutional structure requires "*all* state officials . . . to enact, enforce, and interpret state law in such a fashion as not to obstruct the operation of federal law, and the attendant reality [is] that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid." 521 U.S. at 913; *see also New York*, 505 U.S. at 162 (noting that the Commerce Clause permits Congress to "hav[e] state law pre-empted by federal [law]").

In light of the fact that the Supremacy Clause is the Constitution's answer to the problem that had made life difficult under the Articles of Confederation—the lack of a mechanism to enforce uniform national policies--accepting Appellants' position that a state's sovereignty is violated when it is precluded from following a policy different than that set forth by federal law (as New Jersey seeks to do with its Sports Wagering Law), would be revolutionary. *See* The Federalist No. 44, at 323 (James Madison) (B. Fletcher ed. 1996) (explaining that without the Supremacy Clause "all the authorities contained in the proposed Constitution . . . would have been annulled, and the new Congress would have been reduced to the same impotent condition with [the Articles of Confederation]").

And it is not hard to see why invalidating contrary state law does not implicate a state's sovereignty or otherwise commandeer the states. When Congress

passes a law that operates via the Supremacy Clause to invalidate contrary state laws, it is not telling the states what to do, it is barring them from doing something they want to do. Anti-commandeering challenges to statutes worded like PASPA have thus consistently failed. *See, e.g.*, *Kelley v. United States*, 69 F.3d 1503, 1510 (10th Cir. 1995) (upholding constitutionality of intrastate motor carrier statute, noting that it preempted state law and in doing so did not "compel[] the states to voluntarily act by enacting or administering a federal regulatory program"); *California Dump Truck Owners Ass'n v. Davis*, 172 F. Supp. 2d 1298, 1304 (E.D. Cal. 2001) (upholding constitutionality of FAAAA provision against an anti-commandeering challenge, noting that, unlike the laws in *New York* and *Printz*, the FAAAA provision, insofar as it merely preempts state law, "tell[s] states *what not to do*").[11]

To be sure, the Supremacy Clause elevates only laws that are otherwise within Congress' power to enact. *See, e.g.*, *New York*, 504 U.S. at 166 (noting that

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[11] As the Leagues note, numerous federal laws are framed to prohibit States from enacting or enforcing laws contrary to federal standards, and these regulations all enjoy different preemptive qualities. *See, e.g.*, *Farina v. Nokia*, 625 F.3d 97, 130 (3d Cir. 2010) (noting that statute which provides that "no State . . . shall have any authority to regulate the entry of or the rates charged by any commercial mobile service" is an express preemption provision); *MacDonald v. Monsanto*, 27 F.3d 1021, 1024 (5th Cir. 1994) (noting that law stating that a "State shall not impose or continue in effect any requirement for labeling or packing" pesticides is a preemption provision). The operation of these and other provisions is called into question by Appellants' view that the everyday operation of the Supremacy Clause raises anti-commandeering concerns.

Congress may not, consistent with the Commerce Clause, "regulate state governments' regulation of interstate commerce"). But we have held that Congress may prohibit state-licensed gambling consistent with the Commerce Clause. The argument that PASPA is beyond Congress' authority thus hinges on the notion that the invalidation of a state law pursuant to the Commerce Clause has the same "commandeering" effect as the federal laws struck down in *New York* and *Printz*. We turn now to this contention.

(b) PASPA is Unlike the Laws Struck Down in *New York* and *Printz*

Appellants' efforts to analogize PASPA to the provisions struck down in *New York* and *Printz* are unavailing. Unlike the problematic "take title" provision and the background check requirements, PASPA does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law. They are not even required, like the states were in *F.E.R.C.*, to expend resources considering federal regulatory regimes, let alone to adopt them. Simply put, we discern in PASPA no "directives requiring the States to address particular problems" and no "command[s] to the States' officers . . . to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935.

As the District Court correctly reasoned, the fact that PASPA sets forth a prohibition, while the *New York/Printz* regulations required affirmative action(s) on the part of the states, is of significance. Again, it is hard to see how Congress can "commandeer" a state, or how it can be found to regulate how a state regulates, if it does not require it to do anything at all. The

distinction is palpable from the Supreme Court's anti-commandeering cases themselves. State laws requiring affirmative acts may or may not be constitutional, *compare F.E.R.C.*, 456 U.S. at 761-63 (upholding statute because requirement that states expend resources considering federal standards was not commandeering) *with Printz*, 521 U.S. at 904-05 (finding requirement that states perform background checks unconstitutional). On the other hand, statutes prohibiting the states from taking certain actions have never been struck down even if they require the expenditure of some time and effort or the modification or invalidation of contrary state laws, *see Baker*, 485 U.S. at 515; *Reno*, 528 U.S. at 150. As the District Court carefully demonstrated, in all its anti-commandeering cases, the Supreme Court has been concerned with conscripting the states into affirmative action. *See NCAA II*, 2013 WL 772679, at *17.[12]

Recognizing the importance of the affirmative/negative command distinction, Appellants assert that PASPA does impose an affirmative requirement that the states act, by prohibiting them from repealing

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[12] The circuits that have considered anti-commandeering challenges, although addressing laws that are fundamentally different from PASPA, have similarly found this distinction significant. *See, e.g., Connecticut v. Physicians Health Servs. of Conn.*, 287 F.3d 110, 122 (2d Cir. 2002) (holding that a provision "limit[ing] states' power to sue as *parens patriae* . . . does not commandeer any branch of state government because it imposes no affirmative duty of any kind on them"); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (rejecting a commandeering challenge to a statute that did "not force state officials to do anything affirmative to implement" the statutory provision).

anti-sports wagering provisions.[13] We agree with Appellants that the affirmative act requirement, if not properly applied, may permit Congress to "accomplish exactly what the commandeering doctrine prohibits" by stopping the states from "repealing an existing law." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). But we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.

Under PASPA, "[i]t shall be unlawful for . . . a governmental entity to sponsor, operate, advertise, promote, *license, or authorize by law or compact*" a sports wagering scheme. 28 U.S.C. § 3702(1) (emphasis added). Nothing in these words *requires* that the states keep any law in place. All that is prohibited is the issuance of gambling "license[s]" or the affirmative "authoriz[ation] *by law*" of gambling schemes. Appellants contend that to the extent a state may choose to repeal an affirmative prohibition of sports gambling, that is the same as "authorizing" that activity,

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[13] Appellants also rely on *Coyle v. Smith*, where the Supreme Court struck down a law requiring Oklahoma to not change the location of its capital within seven years of its admission into the Union, 221 U.S. 559, 567 (1911), to lessen the significance of the "affirmative act" requirement we distill from the anti-commandeering cases. N.J. Br. 42, 44. But, despite the Supreme Court's citation to *Coyle* in *New York*, see 505 U.S. at 162, *Coyle* did not turn on impermissible commandeering. Instead, the Court struck down the statute as being traceable to no power granted by Congress in the Constitution, pertaining "purely to the internal polic[ies] of the state," and in violation of the principle that all states are admitted on equal footing into the Union. *Coyle*, 221 U.S. at 565, 579. PASPA does not raise any of these concerns, and neither do the modern anti-commandeering cases.

and therefore PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it. This argument is problematic in numerous respects. Most basically, it ignores that PASPA speaks only of "authorizing *by law*" a sports gambling scheme. We do not see how having *no law* in place governing sports wagering is the same as authorizing it by law. Second, the argument ignores that, in reality, the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people. Indeed, that the Legislature needed to enact the Sports Wagering Law itself belies any contention that the mere repeal of New Jersey's ban on sports gambling was sufficient to "authorize [it] by law." The amendment to New Jersey's Constitution itself did not purport to affirmatively authorize sports wagering but indeed only gave the Legislature the power to "authorize by law" such activities. N.J. Const. Art. IV, § VII, ¶ 2 (D), (F). Thus, the New Jersey Legislature itself saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering—the Sports Wagering Law was required. *Cf. Hernandez v. Robles*, 855 N.E.2d 1, 5-6 (N.Y. 2006) (rejecting as "untenable" a construction of a domestic relation law, silent on the matter of the legality of same-sex marriages, as permitting such unions). Congress in PASPA itself saw a difference between general sports gambling activity and that which occurs under the auspices of state approval and authorization, and chose to reach private activity only

to the extent that it is conducted "pursuant to State law."

In short, Appellants' attempt to read into PASPA a requirement that the states must affirmatively keep a ban on sports gambling in their books rests on a false equivalence between repeal and authorization and reads the term "by law" out of the statute, ignoring the fundamental canon that, as between two plausible statutory constructions, we ought to prefer the one that does not raise a series of constitutional problems. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

To be sure, we take seriously the argument that many affirmative commands can be easily recast as prohibitions. For example, the background check rule of *Printz* could be recast as a requirement that the states *refrain* from issuing handgun permits *unless* background checks are conducted by their officials. The anti-commandeering principle may not be circumvented so easily. But the distinction between PASPA's blanket ban and *Printz*'s command, even if the latter is recast as a prohibition, remains. PASPA does not say to states "you may only license sports gambling if you conscript your officials into policing federal regulations" or otherwise impose any condition that the states carry out an affirmative act or implement a federal scheme before they may regulate or issue a license. It simply bars certain acts under any and all circumstances. And if affirmative commands may always be recast as prohibitions, then the prohibitions in myriads of routine federal laws may always be rephrased as affirmative commands. This shows that

Appellants' argument proves too much—the anti-commandeering cases, under that view, imperil a plethora of acts currently termed as prohibitions on the states.

And, to the extent we entertain the notion that PASPA's straightforward *prohibition* on action may be recast as presenting two *options*, these options are also quite unlike the two coercive choices available in *New York*—pass a law to deal with radioactive waste or expend resources in taking title to it. Neither of PASPA's two "choices" affirmatively requires the states to enact a law, and both choices leave much room for the states to make their own policy. Thus, under PASPA, on the one hand, a state may repeal its sports wagering ban, a move that will result in the expenditure of no resources or effort by any official. On the other hand, a state may choose to keep a complete ban on sports gambling, but it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be.

We agree that these are not easy choices. And it is perhaps true (although there is no textual or other support for the idea) that Congress may have suspected that most states would choose to keep an actual prohibition on sports gambling on the books, rather than permit that activity to go on unregulated. But the fact that Congress gave the states a hard or tempting choice does not mean that they were given no choice at all, or that the choices are otherwise unconstitutional. *See United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000) ("A hard choice is not the same as no choice."); *see also F.E.R.C.*, 456 U.S. at 766 (upholding a choice between expending state resources to consider federal standards or abandoning

field to federal regulation). And however hard the choice is in PASPA, it is nowhere near as coercive as the provisions in *New York* that punished states unwilling to enact a regulatory scheme and that did pass muster. *See New York*, 505 U.S. at 172, 173-74 (upholding a provision permitting states with waste disposal sites to charge more to non-compliant states and a statute taxing such states to the benefit of compliant states); *see also City of Abilene v. EPA*, 325 F.3d 657, 662 (5th Cir. 2003) (explaining that as long as "the alternative to implementing a federal regulatory program does not offend the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise unappealing is insufficient to establish a Tenth Amendment violation"). PASPA imposes no punishment or punitive tax. We also disagree with the suggestion that the choices states face under PASPA are as coercive as the Medicaid expansion provision struck down in *Sebelius*, which threatened states unwilling to participate in a complex and extensive federal regulatory program with the loss of funding amounting to over ten percent of their overall budget. *Sebelius*, 132 S. Ct. at 2581.

Finally, we note that the attempt to equate a ban on state-sanctioned sports gambling to a plan by Congress to force the states into banning the activity altogether gives far too much credit to Congress' strong-arming powers. The attendant reality is that in the field of regulating certain activities, such as gambling, prostitution, and drug use, states have always gravitated towards prohibitions, regardless of Congress' efforts. Indeed, as noted, *all but one* state prohibited broad state-sponsored gambling at the time PASPA was enacted. Congress, by prohibiting state-licensing

schemes, may indeed have made it harder for states to turn their backs on the choices they previously made (although in PASPA it made it less hard for New Jersey), but that choice was already very hard, and very unlikely to be made to begin with (as New Jersey's history with the regulation of sports gambling also illustrates).

(c) PASPA as Regulating State Conduct—*Baker* and *Reno*

Additionally, PASPA is remarkably similar to the prohibitions on state action upheld in *Baker* and *Reno*. *Baker*'s regulations prohibited the states from issuing bearer bonds, which in turn required states to issue new regulations and invalidated old ones; *Reno*'s anti-disclosure provisions prohibited the states from disseminating certain information, necessitating the expenditure of resources to comply with the federally imposed prohibitions. To the extent PASPA makes it unattractive for states to repeal their anti-sports wagering laws, which in turn requires enforcement by states, the effort PASPA requires is simply that the states enforce the laws they choose to maintain, and is therefore plainly less intrusive than the laws in *Baker* and *Reno*. PASPA also has the effect, like the laws in those two cases, of rendering inoperative any contrary state laws.

We are not persuaded by Appellants' arguments that *Baker* and *Reno* are inapposite. They contend, first, that *Reno* is different because it involved regulation of the states in the same way as private parties. But that overstates the regulations at issue in *Reno*, which were directed at state DMVs and only incidentally prohibited private persons from further disseminating data they may obtain from the DMVs. *See*

528 U.S. at 144. Indeed, the *Reno* Court did "not address the question whether general applicability is a constitutional requirement for federal regulation of the States." *Id.* at 151. And, as mentioned, PASPA *does* operate on private individuals insofar as it prohibits them from engaging in state-sponsored gambling. But private individuals cannot be prohibited from issuing gambling licenses, because they have never been able to do so. Second, we find no basis to distinguish PASPA from the laws in *Reno* and *Baker* on the ground that the latter regulate the states solely as participants in the market. DMVs are uniquely state institutions; states thus obtain information through the DMVs not as participants in the market, but in their unique role as authorizers of commercial activity. PASPA is no different: it regulates the states' permit-issuing activities by prohibiting the issuance of the license altogether, as in *Baker*, where the state was essentially prohibited from issuing the bearer bond. Third, we decline to draw a distinction between PASPA and the laws at issue in *Reno* and *Baker* on the ground that PASPA involves a regulation of the states as states. The Supreme Court's anti-commandeering cases do not contemplate such distinction.[14]

Despite the fact that PASPA is very similar to the prohibition on state activity upheld unanimously in *Reno*, Appellants insist that certain statements in that opinion support its view that PASPA is unconstitutional. Appellants insist that under *Reno* a law is

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[14] And, arguably, the Supreme Court's Tenth Amendment jurisprudence cautions against drawing lines between activities that are "traditional" to state government and those that are not. *See Garcia*, 469 U.S. at 546 (calling such distinctions "unworkable").

unconstitutional if it requires the states to govern according to Congress' instructions or if it "influences" the ways in which the states regulate their own citizens. *See* N.J. Br. at 3, 18, 40, 42, 43, 45-46, 52. But no one contends that PASPA requires the states to enact any laws, and we have held that it also does not require states to maintain existing laws. And one line from *Reno*, that the law upheld there did not "control or influence the manner in which States regulated private parties," 528 U.S. at 142, cannot possibly bear the great weight that Appellants would hoist upon it. Most federal regulation inevitably influences the manner in which states regulate private parties. If that were enough to violate the anti-commandeering principle, then *Hodel* and *F.E.R.C.* were wrongly decided. Indeed, nowhere in *Reno* (or *Baker*, from where that line was quoted, *see id.* (quoting *Baker*, 485 U.S. at 514)), did the Court suggest that the absence of an attempt to influence how states regulate private parties was *required* to avoid violating the anti-commandeering principle.[15]

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[15] The parties spar over how the accountability concerns of anti-commandeering cases weigh here. But *New York* and *Printz* make clear that they are not implicated when Congress does not enlist the States in the implementation of a federal regulatory program. To strike down any law that may cause confusion as to whether a prohibition comes from the federal government or from a State's choice, before considering whether that law actually commandeers the States, is to put the cart before the horse. Indeed, the Supreme Court in *Reno* rejected the notion that simply raising the specter of accountability problems is enough to find an anti-commandeering violation. *See* 528 U.S. at 150-51.

(d) The Sports Wagering Law Conflicts With Federal Policy With Respect to Sports Gambling and is Therefore Preempted

Alternatively, to the extent PASPA coerces the states into keeping in place their sports-wagering bans, that coercion may be upheld as fitting into the exception drawn in anti-commandeering cases for laws that impose federal standards over conflicting state rules, in areas where Congress may otherwise preempt the field. Under this view, PASPA gives states the choice of either implementing a ban on sports gambling or of accepting complete deregulation of that field as per the federal standard. In *Hodel*, for example, the choice was implementing certain minimum-safety regulations or living in a world where the federal government enforced them.

PASPA makes clear that the federal policy with respect to sports gambling is that such activity should not occur under the auspices of a state license. As noted, PASPA prohibits individuals from engaging in a sports gambling scheme "pursuant to" state law. 28 U.S.C. § 3702(2). In other words, even if the provision that offends New Jersey, § 3702(1), were excised from PASPA, § 3702(2) would still plainly render the Sports Wagering Law inoperative by prohibiting private parties from engaging in gambling schemes pursuant to that authority. Thus, the federal policy with respect to sports wagering that § 3702(2) evinces is clear: to stop private parties from resorting to state law as a cover for gambling on sports. The Sports Wagering Law, in purporting to permit individuals to skirt § 3702(2), "authorizes [private parties] to engage in conduct that the federal [Act] forbids, [and therefore] it 'stands as an obstacle to the[] accomplishment

and execution of the full purposes and objectives of Congress,'" and accordingly conflicts with PASPA and is preempted. *See Mich. Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984).[16]

And there are other provisions in federal law, outside of PASPA, aimed at protecting the integrity of sports from the pall of wagering and that further demonstrate the federal policy of disfavoring sports-gambling. Indeed, in enacting PASPA, Congress explicitly noted that the law was "complementary to and consistent with [then] current Federal law" with respect to sports wagering. Senate Report at 3557. Congress has, for example, criminalized attempts to fix the outcome of a sporting event, 18 U.S.C. § 224, barred the placement of a sports gambling bet through wire communications to or from a place where such bets are illegal, 18 U.S.C. § 1084, and proscribed interstate transportation of means for carrying out sports lotteries, 18 U.S.C. §§ 1301, 1307(d).[17]

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[16] New Jersey asks that we ignore this argument because it was not raised by the United States below. But it is axiomatic that we may affirm on any ground apparent on the record, particularly when considering *de novo* the constitutionally of a Congressional enactment. The United States may decide not to advance particular arguments, but we may not, consistent with our duty to "save and not to destroy," *Jones & Laughlin Steel*, 301 U.S. at 30, use that choice to declare unconstitutional an act of Congress. The same may be said of arguments that the United States and the Leagues' reading of PASPA has changed throughout the litigation and should therefore be discounted, *see, e.g.*, Oral Arg. Tr. 71:14-19 (June 26, 2013).

[17] Appellants point to a statement in the Senate Report wherein the Committee notes that, according to the Congres-

Appellants contend that Congress has not preempted state law but instead incorporated it to the extent certain prohibitions are tied to whatever is legal under state law. But PASPA itself is not tied to state law. Rather, PASPA prohibits engaging in schemes *pursuant to* state law. 28 U.S.C. § 3702(2). To be sure, some of the other cited provisions tie themselves to state law—but the Tenth Amendment does not require that Congress leave *less* room for the states to govern. *Cf. F.E.R.C.*, 456 U.S. at 764 (noting that there is no Tenth Amendment problem if Congress "allow[s] the States to enter the field if they promulgate[] regulations consistent with federal standards").

Appellants also attempt to distinguish PASPA from other preemptive schemes. They note that preemptive schemes normally either impose an affirmative federal standard or a rule of non-regulation, and that PASPA does not impose an affirmative federal standard and cannot possibly be construed as a law aimed at permitting unregulated sports gambling

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sional Budget Office, there would be "no cost to the federal government . . . from enactment of this bill," Senate Report at 3561, as proof that PASPA seeks to foist upon the states the responsibility for banning sports wagering. But this statement is taken out of context. The import of it was that PASPA would require no "direct spending or receipts" of funds, *id.*, but the Senate Report itself makes clear that the Justice Department would use already-earmarked funds to permit it to "enforce the law without utilizing criminal prosecutions of State officials," *id.* at 3557. For a report issued well before the opinions in *New York* and *Printz* delineated the contours of modern anti-commandeering jurisprudence, the Senate Report is remarkably clear in that it seeks to increase the federal government's role in policing sports wagering, not pass that obligation along to the states.

because its aim was to stop the spread of sports gambling. But, PASPA's text and legislative history reflect that its goal is more modest—to ban gambling pursuant to a state scheme—because Congress was concerned that state-sponsored gambling carried with it a label of legitimacy that would make the activity appealing. Whatever else we may think were Congress' secret intentions in enacting PASPA, nothing we know of speaks to a desire to ban all sports wagering. Moreover, the argument once again ignores that PASPA does impose a federal standard directly on private individuals, telling them, essentially, thou shall not engage in sports wagering under the auspices of a state-issued license. *See* 28 U.S.C. § 3702(2).

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We hold that PASPA does not violate the anti-commandeering doctrine. Although many of the principles set forth in anti-commandeering cases may abstractly be used to support Appellants' position, doing so would result in an undue expansion of the anti-commandeering doctrine. If attempting to influence the way states govern private parties, or requiring the expenditure of resources, or giving the states hard choices, were enough to violate anti-commandeering principles, then what of *Hodel*, *F.E.R.C.*, *Baker*, and *Reno*? The overriding of contrary state law via the Supremacy Clause may result in influencing or changing state policies, but there is nothing in the anti-commandeering cases to suggest that the principle is meant to apply when a law merely operates via the Supremacy Clause to invalidate contrary state action. Missing here is an affirmative command that the states enact or carry out a federal scheme and PASPA is simply nothing like the only two laws struck down

under the anti-commandeering principle. Several important points buttress our conclusion: first, PASPA operates simply as a law of pre-emption, via the Supremacy Clause; second, PASPA thus only *stops* the states from doing something; and, finally, PASPA's policy of stopping state-sanctioned sports gambling is confirmed by the independent prohibition on private activity pursuant to any such law. When so understood, it is clear that PASPA does not commandeer the states.

C. Whether PASPA Violates the Equal Sovereignty of the States

Finally, we address Appellants' contention that PASPA violates the equal sovereignty of the states by singling out Nevada for preferential treatment and allowing only that State to maintain broad state-sponsored sports gambling.

1. Equal Sovereignty Cases—*Northwest Austin* and *Shelby County*

The centerpiece of Appellants' equal sovereignty argument is the Supreme Court's analysis of the Voting Rights Act of 1965 ("VRA") in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), and *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013). In *Northwest Austin*, the Supreme Court was asked by a small utility district to rule on the constitutionality of § 5 of the VRA, which required the district to obtain preclearance from federal authorities before it could make changes to the manner in which its board was elected. The district had sought an exemption from the preclearance requirement, but the district court held that only states are eligible for such "bailouts" under the Act.

Nw. Austin, 557 U.S. at 196-97. On direct appeal, the Supreme Court stated that § 5 raises "federalism concerns" because it "differentiates between the States." *Id.* at 203. The Court also explained that "[d]istinctions [between the states] can be justified in some cases" such as when Congress enacts "remedies for *local* evils which have subsequently appeared." *Id.* (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966)). However, the Court did not ultimately decide whether § 5 violated the equal sovereignty principle, invoking instead the canon of constitutional avoidance to construe the VRA's bailout provision to permit the district to obtain an exemption. *Id.* at 205.

In *Shelby County*, when asked to revisit the constitutionality of § 5, the Court reiterated the "basic principles" of equal sovereignty set forth in *Northwest Austin* and invalidated § 4(b) of the VRA, which set forth a formula used to determine what jurisdictions are covered by § 5 preclearance. 133 S. Ct. at 2622, 2630-31. Nevertheless, § 5 once more survived despite the expressed equal sovereignty concerns. *Id.* at 2631.

Appellants ask that we leverage these statements to strike down all of PASPA because it permits Nevada to license sports gambling. We decline to do so. First, the VRA is fundamentally different from PASPA. It represents, as the Supreme Court explained, "an uncommon exercise of congressional power" in an area "the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections." *Shelby County*, 133 S. Ct. at 2623, 2624. The regulation of gambling via the Commerce Clause is thus not of the same nature as the regulation of elections pursuant to the Reconstruction

Amendments. Indeed, while the guarantee of uniformity in treatment amongst the states cabins some of Congress' powers, *see, e.g.*, U.S. CONST., art. I., § 8, cl. 1 (requiring uniformity in duties and imposts); *id.* § 9, cl. 6 (requiring uniformity in regulation of state ports), no such guarantee limits the Commerce Clause. This only makes sense: Congress' exercises of Commerce Clause authority are aimed at matters of national concern and finding national solutions will necessarily affect states differently; accordingly, the Commerce Clause, "[u]nlike other powers of [C]ongress[,] . . . does not require geographic uniformity." *Morgan v. Virginia*, 328 U.S. 373, 388 (1946) (Frankfurter, J., concurring).

Second, New Jersey would have us hold that laws treating states differently can "only" survive if they are meant to "remedy local evils" in a manner that is "sufficiently related to the problem that it targets." N.J. Br. at 55. This position is overly broad in that it requires the existence of a one-size-fits-all test for equal sovereignty analysis, which, as the foregoing shows, is a perilous proposition in the context of the Commerce Clause. And *Northwest Austin*'s statement that equal sovereignty may yield when local evils appear was made immediately after the statement that regulatory "[d]istinctions can be justified in *some* cases." 557 U.S. at 203 (emphasis added). Thus, local evils appear to be but *one* of the types of cases in which a departure from the equal sovereignty principle is permitted.

Third, there is nothing in *Shelby County* to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of "sensitive areas of state and local policymaking." *Shelby*

County, 133 S. Ct. at 2624. We "had best respect what the [Court's] majority says rather than read between the lines. . . . If the Justices are pulling our leg, let them say so." *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 448 (7th Cir. 1992).

Fourth, even accepting that the equal sovereignty principle applies in the same manner in the context of Commerce Clause legislation, we have no trouble concluding that PASPA passes muster. Appellants' argument that PASPA's exemption does not properly remedy local evils because it "target[ed] the States in which legal sports wagering was absent," N.J. Br. at 56 (emphasis omitted), again distorts PASPA's purpose as being to wipe out sports gambling altogether. When the true purpose is considered—to stop the *spread* of *state-sanctioned* sports gambling—it is clear that regulating states in which sports-wagering already existed would have been irrational. Targeting only states where the practice did not exist is thus more than sufficiently related to the problem, it is *precisely tailored* to address the problem. If anything, Appellants' quarrel seems to be with PASPA's actual goal rather than with the manner in which it operates.

Finally, Appellants ignore another feature that distinguishes PASPA from the VRA—that far from singling out a handful of states for disfavored treatment, PASPA treats *more favorably* a *single* state. Indeed, it is noteworthy that Appellants do not ask us to invalidate § 3704(a)(2), the Nevada grandfathering provision that supposedly creates the equal sovereignty problem. Instead, we are asked to strike down § 3702, PASPA's general prohibition on state-licensed sports gambling. Appellants do not explain why, if PASPA's preferential treatment of Nevada violates

the equal-sovereignty doctrine, the solution is not to strike down only that exemption. The remedy New Jersey seeks—a complete invalidation of PASPA—does far more violence to the statute, and would be a particularly odd result given the law's purpose of curtailing state-licensed gambling on sports. That New Jersey seeks Nevada's preferential treatment, and not a complete ban on the preferences, undermines Appellants' invocation of the equal sovereignty doctrine.

2. Grandfathering Clause Cases

Appellants also argue that PASPA's exemption for Nevada is invalid under the Supreme Court's analysis in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), and *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981), of grandfathering provisions in economic legislation. But in both cases the Supreme Court *upheld* the provisions: in *Dukes*, an ordinance that banned push cart vendors from New Orleans' historic district, but grandfathered those of a certain vintage, 427 U.S. at 305; in *Clover Leaf*, a statute banning the sale of milk in non-recyclable containers but grandfathering non-recyclable paper containers, 449 U.S. at 469.

Two cases upholding economic ordinances aimed at private parties have little to say about state sovereignty. While Appellants contend that *Dukes* and *Clover Leaf Creamery* support their position because they upheld *temporary* grandfathering clauses, there was no indication in either case that the clauses upheld were indeed temporary, that the legislatures were obligated to rescind them in the future, or even that the supposedly temporal quality of the laws was the basis of the Court's holdings, other than a statement in passing in *Dukes* that the legislature had chosen to

"initially" target only a particular class of products. 427 U.S. at 305.[18]

Appellants note that there is no case where a court has "permitted a grandfathering rationale to serve as a justification for violating the fundamental principle of equal sovereignty." N.J. Br. at 59. But it is not hard to see why this is the case: only two Supreme Court cases in modern times have applied the equal sovereignty principle.[19]

V. CONCLUSION

If baseball is a game of inches, constitutional adjudication may be described as a matter of degrees. The questions we have addressed are in many ways *sui generis*. Neither the standing nor the merits is-

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[18] Nor does our decision in *Delaware River Basin Commission v. Bucks County Water & Sewer Authority* support the notion that permanent grandfathering clauses are invalid, given that in that case we simply remanded for development of a record as to why the law at issue contained a grandfathering provision. 641 F.2d 1087, 1096-98 (3d Cir. 1981). PASPA's legislative history is clear as to the purpose behind its own exemptions, and thus survives *Delaware River Basin*.

[19] Appellants also rely on the so-called "equal footing" principle, the notion that Congress may not burden a new state's entry into the Union by disfavoring them over other states in support of their attack on Nevada's exemption. *See, e.g., Escanaba & Lake Mich. Transp. v. Chicago*, 107 U.S. 678, 689 (1883) (explaining that whatever restriction may have been imposed over Illinois' ability to regulate the operation of bridges over the Chicago River, such restrictions disappeared once Illinois was admitted into the Union as a state); *Coyle*, 221 U.S. at 567 (holding that Congress may not require Oklahoma to not change its capital as a condition of admission into the Union). But PASPA does not speak to conditions of admission into the Union.

sues we have tackled permit an easy solution by resorting to a controlling case that provides a definitive "Eureka!" moment. Our role thus is to distill an answer from precedent and the principles embodied therein. But we are confident that our adjudication of this dispute and our resolution of its merits leave us well within the strict bounds set forth by the Constitution and preserves intact the state-federal balance of power.

Having examined the difficult legal issues raised by the parties, we hold that nothing in PASPA violates the U.S. Constitution. The law neither exceeds Congress' enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment or anywhere else in our Constitutional structure. The heart of Appellants' constitutional attack on PASPA is their reliance on two doctrines that—while of undeniable importance—have each only been used to strike down notably intrusive and, indeed, extraordinary federal laws. Extending these principles as Appellants propose would result in significant changes to the day-to-day operation of the Supremacy Clause in our constitutional structure. Moreover, we see much daylight between the exceedingly intrusive statutes invalidated in the anti-commandeering cases and PASPA's much more straightforward mechanism of stopping the states from lending their imprimatur to gambling on sports.

New Jersey and any other state that may wish to legalize gambling on sports within their borders are not left without redress. Just as PASPA once gave New Jersey preferential treatment in the context of gambling on sports, Congress may again choose to do

so or, more broadly, may choose to undo PASPA altogether. It is not our place to usurp Congress' role simply because PASPA may have become an unpopular law. The forty-nine states that do not enjoy PASPA's solicitude may easily invoke Congress' authority should they so desire.

The District Court's judgment is AFFIRMED.

VANASKIE, Circuit Judge, concurring in part and dissenting in part.

I agree with my colleagues that the Leagues have standing to challenge New Jersey's Sports Wagering Law, N.J. Stat. Ann. § 5:12A-2, and that the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3702, does not violate the principle of "equal sovereignty." I therefore join parts III and IV.C of the majority's decision in full. I also agree that, ordinarily, Congress has the authority to regulate gambling pursuant to the Commerce Clause, and thus I join part IV.A of the majority opinion as well. Yet, PASPA is no ordinary federal statute that directly regulates interstate commerce or activities substantially affecting such commerce. Instead, PASPA prohibits states from authorizing sports gambling and thereby directs how *states* must treat such activity. Indeed, according to my colleagues, PASPA essentially gives the states the choice of allowing totally unregulated betting on sporting events or prohibiting all such gambling. Because this congressional directive violates the principles of federalism as articulated by the Supreme Court in *United States v. New York*, 505 U.S. 142 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), I respectfully dissent from that part of the majority's opinion that upholds PASPA as a constitutional exercise of congressional authority.

I.

I agree with my colleagues that an appropriate starting point for addressing Appellants' claims is *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). In *Hodel*, the Court reviewed the

constitutionality of the federal Surface Mining Control and Reclamation Act, a comprehensive statutory scheme designed to regulate against the harmful effects of surface coal mining. *Id.* at 268. The act permitted states that wished to exercise permanent regulatory authority over surface coal mining to submit plans that met federal standards for federal approval. *Id.* at 271. In addition, the federal government created a federal enforcement program for states that did not obtain federal approval for state plans. *Id.* at 272. Applying the framework set forth in the since-overruled case, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Court concluded that the act did not regulate "'States as States'" because the challenged provisions governed only private individuals' and business' activities and because "the States are not compelled to enforce the . . . standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.* at 287-88. The Court further explained that

> [i]f a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

Id. at 288. Even post-*Garcia*, the Court has explained that the act at issue in *Hodel* presented no Tenth

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Id. at 288. Even post-*Garcia*, the Court has explained that the act at issue in *Hodel* presented no Tenth

Amendment problem "because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." *Printz*, 521 U.S. at 926.

As the majority points out, a year later, in *FERC v. Mississippi*, 456 U.S. 742 (1982), the Court upheld the constitutionality of two titles of the Public Utility Regulatory Policies Act ("PURPA"), which directed state regulatory authorities to "consider" certain standards and approaches to regulate energy and prescribed certain procedures, but did not require the state authorities to adopt or implement specified standards. *Id.* at 745-50. As in *Hodel*, the Court observed that Congress had authority to preempt the field at issue—in *FERC*'s case, energy regulation. *Id.* at 765. The Court explained:

> PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards. While the condition here is affirmative in nature—that is, it directs the States to entertain proposals—nothing in this Court's cases suggests that the nature of the condition makes it a constitutionally improper one. There is nothing in PURPA "directly compelling" the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' "separate and independent existence," *Lane County v. Oregon*, 7

> Wall. 71, 76, 19 L.Ed. 101 (1869); *Coyle v. Oklahoma*, 221 U.S. 559, 580, 31 S.Ct. 688, 695, 55 L.Ed. 853 (1911), and do not impair the ability of the States "to function effectively in a federal system." *Fry v. United States*, 421 U.S., at 547, n.7, 95 S.Ct., at 1795, n.7; *National League of Cities v. Usery*, 426 U.S., at 852, 96 S.Ct., at 2474. To the contrary, they offer the States a vehicle for remaining active in an area of overriding concern.

Id. at 765-66.

Subsequently, the Supreme Court struck down provisions in two cases based on violations of federalism principles. At issue in the first case, *New York*, was a federal statute that intended to incentivize "States to provide for the disposal of low level radioactive waste generated within their borders." *New York*, 505 U.S. at 170. As "an alternative to regulating pursuant to Congress' direction," one of the "incentives" provided states the "option of taking title to and possession of the low level radioactive waste . . . and becoming liable for all damages waste generators suffer[ed] as a result of the State's failure to do so promptly." *Id.* at 174-75. At the outset, the Court characterized the issue before it as "concern[ing] the circumstances under which Congress may use the State as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *Id.* at 161.

The Court in *New York* held the "take title" provision unconstitutional because it "'commandeer[ed] the

legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'" in violation of the principles of federalism. *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288). The Court explained that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, *it lacks the power directly to compel the States to require or prohibit those acts.*" *Id.* at 166 (emphasis added). It further elaborated that "[t]he allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; *it does not authorize Congress to regulate state governments' regulation of interstate commerce.*" *Id.* (emphasis added).

Second, in *Printz*, the Court reviewed a temporary federal statutory provision that required certain state law enforcement officers to conduct background checks on potential handgun purchasers as part of a federal regulatory scheme. *Printz*, 521 U.S. at 903-04. Observing that "'[t]he Federal Government may not compel the States to enact or administer a federal regulatory program,'" *id.* at 933 (quoting *New York*, 505 U.S. at 188), the Court held that "Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Id.* at 935. The Court further explained that Congress categorically "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.*

Later, in *Reno v. Condon*, 528 U.S. 141 (2000), a case the majority regards as "remarkably similar" to the matter *sub judice*, (Maj. Op. 43), a unanimous Court held that the Driver's Privacy Protection Act

("DPPA"), a generally applicable law which regulates the disclosure and resale by states and private persons of personal information contained in state department of motor vehicle records, "did not run afoul of the federalism principles enunciated in *New York* . . . and *Printz*." *Id.* at 143, 146, 151. After first determining that the DPPA was a proper exercise of congressional authority under the Commerce Clause, the Court rejected South Carolina's argument that the act violated federalism principles because it would "require time and effort on the part of state employees." *Id.* at 148, 150. Finding *New York* and *Printz* inapplicable, the Court relied instead on *South Carolina v. Baker*, 485 U.S. 505 (1988),[1] which "upheld a statute that prohibited States from issuing unregistered bonds because the law 'regulate[d] state activities,' rather than 'seeking[ing] to control or influence the manner in which States regulate private parties.'" *Reno*, 528 U.S. at 150 (quoting *Baker*, 485 U.S. at 514-15).[2] The Court further explained:

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[1] The majority also characterizes Baker as "remarkably similar" to PASPA's prohibition of state action. (Maj. Op. 43.)

[2] In Baker, the Court observed:

> The [intervenor] nonetheless contends that § 310 has commandeered the state legislative and administrative process because many state legislatures had to amend a substantial number of statutes in order to issue bonds in registered form and because state officials had to devote substantial effort to determine how best to implement a registered bond system. Such "commandeering" is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that

> The DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

Id. at 151.

Most recently, in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), the Court struck down, as violative of the Spending Clause, a provision in the Patient Protection and Affordable Care Act ("ACA") that would have withheld federal Medicaid grants to states unless they expanded their Medicaid eligibility requirements in accordance with conditions in the ACA. *Id.* at 2581-82, 2606-07 (plurality). Quoting *New York*, Chief Justice Roberts, writing for a three-justice plurality, observed that "'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.'" *Id.* at 2602 (quoting *New York*, 505 U.S. at 162). The plurality then explained that, based on that principle, *New York* and *Printz* had struck down federal statutes that "commandeer[ed] a State's legislative or administrative apparatus for federal purposes." *Id.* The plurality also noted that, within the authority of the Spending Clause, Congress may not create "inducements to exert a power akin to undue influence" where

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> activity is a commonplace that presents no constitutional defect.

Baker, 485 U.S. at 514-15.

"pressure [would] turn[] into compulsion." *Id.* (internal quotations omitted). Recognizing that "'[t]he Constitution simply does not give Congress the authority to require the States to regulate,'" the plurality observed that "[t]hat is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system of its own." *Id.* (quoting *New York*, 505 U.S. at 178). The plurality ultimately concluded that the Medicaid conditions were unduly coercive and reiterated that "Congress may not simply 'conscript state [agencies] into the national bureaucratic army.'" *Id.* at 2604, 2606-07 (quoting *FERC*, 456 U.S. at 775 (O'Connor, J., concurring in judgment in part and dissenting in part)).

While Chief Justice Roberts' opinion concerning the Medicaid expansion provisions in *Sebelius* garnered the signatures of only three justices, the four dissenting justices also invoked the federalism principles of *New York* in concluding that the funding conditions in the Medicaid expansion impermissibly compelled states to govern as directed by Congress by coercing states' participation in the expanded program. *Id.* at 2660-62 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Thus, seven justices found the Medicaid expansion unconstitutional, citing the federalism principles articulated in *New York* as part of the basis for their conclusion. Importantly, the seven-justice rejection of the Medicaid expansion based, in part, on *New York*, represents a clear signal from the Court that the principles enunciated in *New York* are not limited to a narrow class of cases in which Congress specifically directs a state legislature to affirmatively enact legislation. *Cf. United States v. Richardson*, 658 F.3d 333, 340 (3d Cir. 2011) (observing that even if not

binding due to the votes of a splintered Court, "the collective view of [a majority of] justices is, of course, persuasive authority").

II.

New York and *Printz* clearly established that the federal government cannot direct state legislatures to enact legislation and state officials to implement federal policy. It is true that the two particular statutes under review in those cases involved congressional commands that states affirmatively enact legislation, *see New York*, 505 U.S. at 176-77, or affirmatively enforce a federal regulatory scheme, *see Printz*, 521 U.S. at 935. Nothing in *New York* or *Printz*, however, limited the principles of federalism upon which those cases relied to situations in which Congress directed affirmative activity on the part of the states. Rather, the general principle articulated by the Court in *New York* was that

> even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require *or prohibit those acts*. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; *it does not authorize Congress to regulate state governments' regulation of interstate commerce*.

New York, 505 U.S. at 166 (emphasis added) (citations omitted). Here, it cannot be disputed that PASPA "regulate[s] state governments' regulation of interstate commerce." *See id.* States regulate gambling, in

part, by licensing or authorizing such activity. By prohibiting states from licensing or authorizing sports gambling, PASPA dictates the manner in which states must regulate interstate commerce and thus contravenes the principles of federalism set forth in *New York* and *Printz*.[3]

If the objective of the federal government is to require states to regulate in a manner that effectuates federal policy, any distinction between a federal directive that commands states to take affirmative action and one that prohibits states from exercising their sovereignty is illusory. Whether stated as a command to engage in specific action or as a prohibition against specific action, the federal government's interference with a state's sovereign autonomy is the same. Moreover, the recognition of such a distinction is untenable, as affirmative commands to engage in certain conduct can be rephrased as a prohibition against not engaging in that conduct. Surely the structure of Our Federalism does not turn on the phraseology used by Congress in commanding the states how to regulate.

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[3] I agree with my colleagues that Congress has the authority under the Commerce Clause to ban gambling on sporting events, and that such a ban could include state-licensed gambling. I part company with my colleagues because that is not what PASPA does. Instead, PASPA conscripts the states as foot soldiers to implement a congressional policy choice that wagering on sporting events should be prohibited to the greatest extent practicable. Contrary to the majority's view, the Supremacy Clause simply does not give Congress the power to tell the states what they can and cannot do in the absence of a validly-enacted federal regulatory or deregulatory scheme. As explained at pages 13-14, *infra*, there is no federal regulatory or deregulatory scheme on the matter of sports wagering. Instead, there is the congressional directive that states not allow it.

An interpretation of federalism principles that permits congressional negative commands to state governments will eviscerate the constitutional lines drawn in *New York* and *Printz* that recognized the limit to Congress's power to compel state instrumentalities to carry out federal policy.

In addition, PASPA implicates the political accountability concerns voiced by the Supreme Court in *New York* and *Printz*. In *New York*, the Court observed that when the federal government preempts an area with a federal law to impose its view on an issue, it "makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U.S. at 168. In contrast, the Court explained, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169. The Court also recognized in *Printz* that in situations where Congress compels state officials to "implement[] a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes" and that states "are . . . put in the position of taking the blame for [the federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930. Although PASPA does not "direct[] the States to regulate," *New York*, 505 U.S. at 169, or "implement[] a federal regulatory program," *Printz*, 521 U.S. at 930, its prohibition on state authorization and licensing of

sports gambling similarly diminishes the accountability of federal officials at the expense of state officials. Instead of directly regulating or banning sports gambling, Congress passed the responsibility to the states, which, under PASPA, may not authorize or issue state licenses for such activities. New Jersey law regulates games of chance, *see* N.J. Stat. Ann. § 5:8-1, *et seq.*, state lotteries, *see id.* § 5:9-1, *et seq.*, and casino gambling within the state, *see id.* § 5:12-1, *et seq.* As a result, it would be natural for New Jersey citizens to believe that state law governs sports gambling as well. That belief would be further supported by the fact that the voters of New Jersey recently passed a state constitutional amendment permitting sports gambling and their representatives in the state legislature subsequently enacted the Sports Wagering Law, at issue here, to regulate such activity. When New Jersey fails to authorize or license sports gambling, its citizens will understandably blame state officials even though state regulation of gambling has become a puppet of the federal government, whose strings are in reality pulled (or cut) by PASPA. States can authorize and regulate some forms of gambling, e.g., lotteries and casinos, but not other forms of gambling to implement policy choices made by Congress. Thus, accountability concerns arising from PASPA's restraint on state regulation also counsel in favor of concluding that it violates principles of federalism.

I do not suggest that the federal government may not prohibit certain actions by state governments—indeed it can. If Congress identifies a problem that falls within its realm of authority, it may provide a federal solution directly itself or properly incentivize states to

regulate or comply with federal standards. For example, if Congress chooses to regulate (or deregulate) directly, it may require states to refrain from enacting their own regulations that, in Congress's judgment, would thwart its policy objectives. Illustrating this point, the Supreme Court held in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), that the federal Airline Deregulation Act, which "prohibit[ed] the States from enforcing any law 'relating to rates, routes, or services' of any air carrier" preempted guidelines regarding fair advertising set forth by an organization of state attorneys general. *Id.* at 378-79, 391. There, as the Court explained, the purpose of the federal prohibition against further state regulation was "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Id.* at 378. Thus, a state law contrary to a federal regulatory or deregulatory scheme is void under the Supremacy Clause.[4]

Unlike in *Morales* and other preemption cases in which federal legislation limits the actions of state governments, in this case, there is no federal scheme regulating or deregulating sports gambling by which to preempt state regulation. PASPA provides no federal regulatory standards or requirements of its own. Instead, it simply prohibits states from "sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or

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[4] Significantly, the majority opinion does not cite any case that sustained a federal statute that purported to regulate the states under the Commerce Clause where there was no underlying federal scheme of regulation or deregulation. In this sense, PASPA stands alone in telling the states that they may not regulate an aspect of interstate commerce that Congress believes should be prohibited.

authoriz[ing]" gambling on sports. 28 U.S.C. § 3702(1). And, PASPA certainly cannot be said to be a deregulatory measure, as its purpose was to stem the spread of state-sponsored sports gambling, not let it go unregulated.[5] *See* S. Rep. No. 102-248, at 3 (1991) ("The purpose of S. 474 is to prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity."); *id.* at 4 ("Senate bill 474 serves an important public purpose, to stop the spread of State-sponsored sports gambling . . . .").

Moreover, contrary to the majority opinion's suggestion, other federal statutes relating to sports gambling do not aggregate to form the foundation of a federal regulatory scheme that can be interpreted as preempting state regulation of sports gambling. First, Section 1084 of Title 18 of the United States Code makes it a federal crime to use wire communications to transmit sports bets in interstate commerce unless the transmission is from and to a state where sports betting is legal. *See* 18 U.S.C. § 1084(a)-(b). Thus, under that section, state law, rather than federal law, determines whether the specified conduct falls within the criminal statute.[6] Second, another federal law prohibits any "scheme . . . to influence . . . by bribery

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[5] The majority reasons that PASPA does not commandeer the states in battling sports gambling because the states retain the choice of repealing their laws outlawing such activity, observing that PASPA does not "require[] that the states keep any law in place." (Maj. Op. at 39.) Contrary to the majority's supposition, it certainly is open to debate whether a state's repeal of a ban on sports gambling would be akin to that state's "authorizing" gambling on sporting events, action that PASPA explicitly forecloses.

[6] Accordingly, if a state repealed an existing ban on wagering on sporting events, federal law would not be implicated.

any sporting contest." *Id.* § 224(a). But, that same section expressly indicates that it "shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operations to the exclusion of any State," and further disavows any attempt to preempt otherwise valid state laws. *Id.* § 224(b). A third federal statute carves out an exception to the general federal prohibition against transporting or mailing material and broadcasting information relating to lotteries for those conducted or authorized by states. *Id.* § 1307(a)-(b). That exception, however, does not pertain to the transportation or mailing of "equipment, tickets, or material" for sports lotteries. *Id.* § 1307(b), (d). Thus, while state sports lotteries violate § 1307, that section does not provide a basis for inferring that it, together with PAPSA, provides a federal regulatory scheme that preempts state regulation of sports gambling by private parties.[7] Further indicating federal deference to state laws on the subject, a fourth federal statute makes it a crime to transport wagering paraphernalia in interstate commerce but does not apply to betting materials to be used on sporting events in states where such betting is legal. *Id.* § 1953(a)-(b). As a result, the federal prohibition of state-authorized sports gambling does not emanate from a federal regulatory scheme that expressly or implicitly preempts state regulation that

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[7] PASPA only extends its prohibition to private persons to the extent persons "sponsor, operate, advertise, or promote [sports gambling] pursuant to the law or compact of a governmental entity." 28 U.S.C. § 3702(2). Because the federal statute applies only to persons who act pursuant to state law, it cannot be said to directly regulate persons.

would conflict with federal policy. Instead, PASPA attempts to implement federal policy by telling the states that they may not regulate an otherwise unregulated activity. The Constitution affords Congress no such power. *See New York*, 505 U.S. at 178 ("The Constitution . . . gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly . . . .").

In addition to preempting state regulation with federal regulation, in some circumstances, Congress may regulate states directly as part of a generally applicable law. *See, e.g.*, *New York*, 505 U.S. at 160 (collecting cases). That is what Congress did with the DPPA, which the Court expressly found in *Reno* to be generally applicable. *See Reno*, 528 U.S. at 151 ("[W]e need not address the question whether general applicability is a constitutional requirement for federal regulation of the States, because the DPPA is generally applicable. The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information . . . ."). Yet, unlike the DPPA in *Reno*, but like the act in *New York*, PASPA is not an example of a generally applicable law that subjects states to the same federal regulation as private parties. *See New York*, 505 U.S. at 160 ("This litigation presents no occasion to apply or revisit the holdings of . . . cases [concerning generally applicable laws], as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."). In addition to its restrictions on actions by state governments relating to sports gam-

bling, PASPA also forbids "a person to sponsor, operate, advertise, or promote" sports gambling if done "*pursuant to the law or compact of a governmental entity*." 18 U.S.C. § 3702(2) (emphasis added); *see also supra* note 2. Thus, PASPA's reach to private parties is predicated on a state's authorization of sponsorship, operation, advertisement, or promotion of sports gambling pursuant to state law.[8] Accordingly, PASPA cannot be said to "subject[] . . . States[s] to the same legislation applicable to private parties," *New York*, 505 U.S. at 160, for state law determines whether § 3702(2) reaches any particular individual.

Nor does *Reno* stand more generally for the proposition that a violation of "anti-commandeering" federalism principles occurs only when Congress requires affirmative activity by state governments. It is true that in upholding the DPPA, the Court noted that it "d[id] not require the South Carolina Legislature to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Reno*, 528 U.S. at 151. Read in context, however, that statement does not suggest that the principles of federalism articulated in *New York* and *Printz* are limited only to situations in which Congress compels states to enact laws or enforce federal regulation. The two sentences preceding that statement make that clear. First, the

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[8] According to the majority, a state would presumably not run afoul of PASPA if it merely refused to prohibit sports gambling. The resulting unregulated market, however, portends grave consequences for which state officials would be held accountable, even though it would be federal policy that prohibits the states from taking effective measures to regulate and police this activity. In this sense, PASPA is indeed coercive.

Court recognized that "the DPPA d[id] not require the States in their sovereign capacity to regulate their own citizens." *Id.* But here, PASPA *does* "require states in their sovereign capacity to regulate their own citizens," *id.*, because it dictates *how* they must regulate sports gambling. Pursuant to PASPA, states may not "sponsor, operate, advertise, promote, license, or authorize" such activity, 28 U.S.C. § 3702(1). Thus, states must govern accordingly, even if that means by refraining from providing a regulatory scheme that governs sports gambling.

Second, the Court explained in *Reno* that, "[t]he DPPA regulates the States *as owners* of data bases" of personal information in motor vehicle records. *Reno*, 528 U.S. at 151 (emphasis added). The fact that the DPPA regulated states as "suppliers to the market for motor vehicle information," *id.*, clearly indicates that the Court viewed the DPPA as direct congressional regulation of interstate commerce, *id.* at 148 (recognizing that motor vehicle information, in the context of the DPPA, is "an article of commerce"), rather than a federal requirement for the states to regulate such activity, *see New York*, 505 U.S. at 166 ("The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."). Although the Court declined to find that *New York* and *Printz* governed the DPPA merely because it would "require time and effort on the part of state employees," it clarified that federally mandated action by states to comply with federal regulations is not necessarily fatal to a federal law that "'regulate[s] state activities,' rather than 'seek[ing] to control or

influence the manner in which States regulate private parties.'" *Reno*, 528 U.S. at 150 (quoting *Baker*, 485 U.S. at 514-15) (second alteration in original).

The direct federal regulation of interstate commerce under the DPPA obviously distinguishes *Reno* from *New York* and *Printz*, where the federal statutes at issue in those cases required states to enact legislation and enforce federal policy, respectively. But it also distinguishes *Reno* from this case. As the Court recognized, "[t]he DPPA establishe[d] a regulatory scheme." *Reno*, 528 U.S. at 144, 148, 151. As discussed above, however, PASPA is not itself a regulatory scheme, nor does it combine with several other scattered statutes in the criminal code to create a federal regulatory scheme. And while Congress could have regulated sports gambling directly under the Commerce Clause, just as it regulated motor vehicle information under the DPPA, it did not. Instead, it chose to set federal parameters as to how states may regulate sports gambling. As a result, any reliance on *Reno* to uphold PASPA is misplaced.

Hodel and *FERC* also provide no support for upholding PASPA. In *Hodel*, the statute at issue permitted states to submit a state regulatory plan for federal approval if they wished to regulate surface coal mining; if states did not seek or obtain approval, then a federal enforcement program would take effect. *Hodel*, 452 U.S. at 271-72. The Court determined that the federal statute did not "commandeer[] the legislative process of the States" because states had a choice about whether to implement regulation that conformed to federal standards or let the federal government bear the burden of regulation. *Id.* at 288; *see also Printz*, 521 U.S. at 925-26 ("In *Hodel* . . . we concluded

that the Surface Mining Control and Reclamation Act of 1977 did not present [a Tenth Amendment] problem . . . because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." (citation omitted)). If PASPA provided a similar choice to states—to either implement state regulation of sports gambling that met federal standards or allow federal regulation to take effect—then perhaps it would pass constitutional muster. But it does not. Therefore *Hodel* is inapplicable to the case at hand.

In addition, in upholding Titles I and III of PURPA in *FERC*, the Court focused on the fact that those titles merely required that states "*consider* the suggested federal standards" as a condition to continued state regulation. *FERC*, 456 U.S. at 765; *see also id.* at 765-66 ("In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' separate and independent existence, and do not impair the ability of the States to function effectively in a federal system." (citations omitted) (internal quotation marks omitted)). Here, PASPA does not provide suggested federal standards and approaches that states must consider in their regulation of sports gambling. Rather, PASPA strips any regulatory choice from state governments.[9] Furthermore, while the PURPA titles

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[9] The majority asserts that the two "choices" presented to a state by PASPA to "repeal its sports wagering ban [or] to keep a complete ban on sports wagering" — "leave much room for the states to make their own policy." (Maj. Op. at 41.) Even if the majority's reading of PASPA as affording these choices is correct, I fail to discern the "room" that is accorded the states to make

in *FERC* did "not involve the compelled exercise of Mississippi's sovereign powers," *id.* at 769, PASPA does indeed suffer from the obverse of such a constitutional defect: it prohibits the exercise of states' sovereign powers. *FERC* is thus distinguishable and inapposite.

Finally, as recognized by the majority, our decision in *Office of the Commissioner of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009), does not bind us to reject a challenge to PASPA on federalism grounds. In that case, we determined that a statutory phrase concerning the extent to which states grandfathered under PASPA could operate certain types of sports gambling was unambiguous. *Id.* at 302-03. As a result of the unambiguous language in PASPA, "we f[ou]nd unpersuasive Delaware's argument that its sovereign status requires that it be permitted to implement its proposed betting scheme." *Id.* at 303. That finding, however, related to our conclusion that PASPA gave clear notice of its "'alter[ation] [of] the usual constitutional balance' with respect to sports wagering," and thus satisfied the requirement of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *See Markell*, 579 F.3d at 303. Yet, here, we are not dealing with a question of which sovereign—state or federal—has the authority under either the "usual" or "altered" constitutional balance to regulate sports gambling. Congress does have the authority to regulate sports gambling when it does so itself. In this case, however, we are faced with the issue of whether Congress has

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their own policy on sports wagering. It seems to me that the only choice is to allow for completely unregulated sports wagering (a result that Congress certainly did not intend to foster), or to ban sports wagering completely.

the authority to regulate how states regulate sports gambling. Thus, our rejection of Delaware's "sovereign status" argument has no bearing on the issue before us. Furthermore, *Markell* provides no guidance in this case, because there we addressed only the meaning of the statutory exception to PASPA relating to grandfathered states found at 28 U.S.C. § 3704(a)(1). *Markell*, 579 F.3d. at 300-01. We did not pass upon the issue of whether Congress may constitutionally restrict how states can regulate under § 3702(1).

In sum, no case law supports permitting Congress to achieve federal policy objectives by dictating how states regulate sports gambling. Instead of directly regulating state activities or interstate commerce, PASPA "seek[s] to control or influence the manner in which States regulate private parties," a distinction the Supreme Court has recognized as significant. *See Reno*, 528 U.S. at 150 (internal quotation marks omitted) ("In *Baker*, we upheld a statute that prohibited States from issuing unregistered bonds because the law 'regulate[d] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'" (quoting *Baker*, 485 U.S. at 51415)); *see also New York*, 505 U.S at 166 ("The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.").

Moreover, no legal principle exists for finding a distinction between the federal government compelling state governments to exercise their sovereignty to enact or enforce laws on the one hand, and restricting

state governments from exercising their sovereignty to enact or enforce laws on the other. In both scenarios the federal government is regulating how *states* regulate. If Congress identifies a problem involving or affecting interstate commerce and wishes to provide a policy solution, it may regulate the commercial activity itself, *see New York*, 505 U.S. at 166, and may even regulate state activity that involves interstate commerce, *see Reno*, 528 U.S. at 150-51; *Baker*, 485 U.S. at 514. In addition, Congress may provide states a choice about whether to implement state regulations consistent with federal standards or let federal regulation preempt state law, *see Hodel*, 452 U.S. at 288, and may require states to "consider" federal standards or approaches to regulation in deciding how to regulate in a preemptible area, *see FERC*, 456 U.S. at 765-66. Furthermore, Congress may "encourage a State to regulate in a particular way," *New York*, 505 U.S. at 166,—even in areas outside the scope of Congress's Article I, § 8 powers—by "attach[ing] conditions on the receipt of federal funds," *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). But, what Congress may not do is "regulate state governments' regulation." *See New York*, 505 U.S. at 166. Whether commanding the use of state machinery to regulate or commanding the nonuse of state machinery to regulate, the Supreme Court "has been explicit" that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162. Because that is exactly what PASPA does here, I conclude it violates the principles of federalism articulated in *New York* and *Printz*. Therefore, I would reverse the District Court's order granting summary judgment for Plaintiffs and vacate the permanent injunction.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-4546, 14-4568, and 14-4569

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC; NEW JERSEY SPORTS & EXPOSITION AUTHORITY

STEPHEN M. SWEENEY, President of the New Jersey Senate; VINCENT PRIETO, Speaker of the New Jersey General Assembly
(Intervenors in District Court)

Governor of New Jersey; David L. Rebuck;
Frank Zanzuccki,
Appellants in No. 14-1546

Stephen M. Sweeney, President of the New Jersey
Senate Vincent Prieto, Speaker of the New Jersey
General Assembly;
Appellants in No. 14-4568

New Jersey Thoroughbred Horsemen's
Association, Inc.,
Appellant in No. 14-4569

On Appeal from the United States District Court
for the District of New Jersey

(District Court No.: 3-14-cv-06450)

ORDER SUR PETITIONS
FOR REHEARING EN BANC

Present: AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, KRAUSE, RENDELL, and BARRY,*
Circuit Judges

A majority of the active judges having voted for rehearing en banc in the above captioned cases, it is ordered that the petitions for rehearing are

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* The Honorable Marjorie O. Rendell and Honorable Maryanne Trump Barry will participate as members of the en banc court pursuant to 3d. Cir. I.O.P. 9.6.4.

GRANTED. The Clerk of this Court shall list the case for rehearing en banc at the convenience of the Court. The opinion and judgment entered August 25, 2015 are hereby vacated.

BY THE COURT,

s/ Marjorie O. Rendell
Circuit Judge

Dated: October 14, 2015
cc: all counsel of record

APPENDIX H

U.S. Constitution, Amendment X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 3701 provides:

§ 3701. Definitions

For purposes of this chapter—

(1) the term "amateur sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

28 U.S.C. § 3702 provides:

§ 3702. Unlawful sports gambling

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3703 provides:

§ 3703. Injunctions

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

28 U.S.C. § 3704 provides:

§ 3704. Applicability

(a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

New Jersey Statutes (N.J. Stat.) § 5:12A-1 provides:

§ 5:12A-1. Definitions relative to sports wagering

As used in this act:

"casino" means a licensed casino or gambling house located in Atlantic City at which casino gambling is conducted pursuant to the provisions of P.L.1977, c.110 (C.5:12-1 et seq.);

"Casino Control Commission" means the commission established pursuant to section 50 of P.L.1977, c.110 (C.5:12-50);

"collegiate sport or athletic event" means a sport or athletic event offered or sponsored by or played in connection with a public or private institution that offers educational services beyond the secondary level;

"division" means the Division of Gaming Enforcement established pursuant to section 55 of P.L.1977, c.110 (C.5:12-55);

"operator" means a casino or a racetrack which has elected to operate a sports pool, either independently or jointly;

"professional sport or athletic event" means an event at which two or more persons participate in sports or athletic events and receive compensation in excess of actual expenses for their participation in such event;

"prohibited sports event" means any collegiate sport or athletic event that takes place in New Jersey or a sport or athletic event in which any New Jersey

college team participates regardless of where the event takes place;

"racetrack" means the physical facility where a permit holder conducts a horse race meeting with parimutuel wagering under a license by the racing commission pursuant to P.L.1940, c.17 (C.5:5-22 et seq.), and includes the site of any former racetrack;

"racing commission" means the New Jersey Racing Commission established by section 1 of P.L.1940, c.17 (C.5:5-22);

"sports event" means any professional sport or athletic event and any collegiate sport or athletic event, except a prohibited sports event;

"sports pool" means the business of accepting wagers on any sports event by any system or method of wagering; and

"sports wagering lounge" means an area wherein a sports pool is operated.

N.J. Stat. § 5:12A-2 provides:

§ 5:12A-2. Casino, racetrack may operate sports pool; severability

a. In addition to casino games permitted pursuant to the provisions of P.L.1977, c.110 (C.5:12-1 et seq.), a casino may operate a sports pool upon the approval of the division and in accordance with the provisions of this act and applicable regulations promulgated pursuant to this act. In addition to the conduct of parimutuel wagering on horse races under regulation by the racing commission pursuant to chapter 5 of Title 5 of the Revised Statutes, a racetrack may operate

a sports pool upon the approval of the division and the racing commission and in accordance with the provisions of this act and applicable regulations promulgated pursuant to this act. Upon approval of the division and racing commission, a casino and a racetrack in this State may enter into an agreement to jointly operate a sports pool at the racetrack, in accordance with the provisions of this act and applicable regulations promulgated pursuant to this act.

With regard to this act, P.L.2011, c.231 (C.5:12A-1 et al.), the duties specified in section 63 of P.L.1977, c.110 (C.5:12-63) of the Casino Control Commission shall apply to the extent not inconsistent with the provisions of this act. In addition to the duties specified in section 76 of P.L.1977, c.110 (C.5:12-76), the division shall hear and decide promptly and in reasonable order all applications for a license to operate a sports pool, shall have the general responsibility for the implementation of this act and shall have all other duties specified in that section with regard to the operation of a sports pool.

The license to operate a sports pool shall be in addition to any other license required to be issued pursuant to P.L.1977, c.110 (C.5:12-1 et seq.) to operate a casino or pursuant to P.L.1940, c.17 (C.5:5-22 et seq.) to conduct horse racing. No license to operate a sports pool shall be issued by the division to any entity unless it has established its financial stability, integrity and responsibility and its good character, honesty and integrity. No license to operate a sports pool shall be issued by the division to any entity which is disqualified under the criteria of section 86 of P.L.1977, c.110 (C.5:12-86).

No later than five years after the date of the issuance of a license and every five years thereafter or within such lesser periods as the division may direct, a licensee shall submit to the division such documentation or information as the division may by regulation require, to demonstrate to the satisfaction of the director of the division that the licensee continues to meet the requirements of the law and regulations.

b. A sports pool shall be operated in a sports wagering lounge located at a casino or racetrack. A sports wagering lounge may be located at a casino simulcasting facility. The lounge shall conform to all requirements concerning square footage, design, equipment, security measures and related matters which the division shall by regulation prescribe. The space required for the establishment of a lounge shall not reduce the space authorized for casino gaming activities as specified in section 83 of P.L.1977, c.110 (C.5:12-83).

c. The operator of a sports pool shall establish or display the odds at which wagers may be placed on sports events.

d. An operator shall accept wagers on sports events from persons physically present in the sports wagering lounge. A person placing a wager shall be at least 21 years of age.

e. An operator shall not admit into the sports wagering lounge, or accept wagers from, any person whose name appears on the exclusion list maintained by the division pursuant to section 71 of P.L.1977, c.110 (C.5:12-71) or on any self-exclusion list maintained by the division pursuant to sections 1 and 2 of

P.L.2001, c.39 (C.5:12-71.2 and C.5:12-71.3, respectively). Sections 1 and 2 of P.L.2002, c.89 (C.5:5-65.1 and C.5:5-65.2, respectively), shall apply to the conduct of sports wagering under this act.

f. The holder of a license to operate a sports pool may contract with an entity to conduct that operation, in accordance with the regulations of the division. That entity shall obtain a license as a casino service industry enterprise prior to the execution of any such contract, and such license shall be issued pursuant to the provisions of P.L.1977, c.110 (C.5:12-1 et seq.) and in accordance with the regulations promulgated by the division in consultation with the commission.

g. If any provision of this act, P.L.2011, c.231 (C.5:12A-1 et al.), or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

N.J. Stat. § 5:12A-3 provides:

§ 5:12A-3. Employees, licensed, registered

a. All persons employed directly in wagering-related activities conducted within a casino or a racetrack in a sports wagering lounge shall be licensed as a casino key employee or registered as a casino employee, as determined by the commission, pursuant to the provisions of P.L.1977, c.110 (C.5:12-1 et seq.). All other employees who are working in the sports wagering lounge may be required to be registered, if appropriate, in accordance with regulations of the division promulgated in consultation with the commission.

b. Each operator of a sports pool shall designate one or more casino key employees who shall be responsible for the operation of the sports pool. At least one such casino key employee shall be on the premises whenever sports wagering is conducted.

N.J. Stat. § 5:12A-4 provides:

§ 5:12A-4. Authority of division to regulate

Except as otherwise provided by this act, the division shall have the authority to regulate sports pools and the conduct of sports wagering under this act to the same extent that the division regulates other casino games. No casino or racetrack shall be authorized to operate a sports pool unless it has produced information, documentation, and assurances concerning its financial background and resources, including cash reserves, that are sufficient to demonstrate that it has the financial stability, integrity, and responsibility to operate a sports pool. In developing rules and regulations applicable to sports wagering, the division shall examine the regulations implemented in other states where sports wagering is conducted and shall, as far as practicable, adopt a similar regulatory framework. The division, in consultation with the commission, shall promulgate regulations necessary to carry out the provisions of this act, including, but not limited to, regulations governing the:

a. amount of cash reserves to be maintained by operators to cover winning wagers;

b. acceptance of wagers on a series of sports events;

c. maximum wagers which may be accepted by an operator from any one patron on any one sports event;

d. type of wagering tickets which may be used;

e. method of issuing tickets;

f. method of accounting to be used by operators;

g. types of records which shall be kept;

h. use of credit and checks by patrons;

i. type of system for wagering;

j. protections for a person placing a wager; and

k. display of the words, "If you or someone you know has a gambling problem and wants help, call 1-800 GAMBLER," or some comparable language approved by the division, which language shall include the words "gambling problem" and "call 1-800 GAMBLER," on all print, billboard, sign, online, or broadcast advertisements of a sports pool and in every sports wagering lounge.

N.J. Stat. § 5:12A-4.1 provides:

§ 5:12A-4.1. Use of mobile gaming devices permitted under certain circumstances

a. Notwithstanding the provisions of any other law to the contrary, the Division of Gaming Enforcement may authorize the use of mobile gaming devices approved by the division within an approved hotel facility that operates a sports pool pursuant to the provisions of P.L.2011, c.231 (C.5:12A-1 et seq.), to enable a player to place wagers on sports or athletic events, provided the player has established an account with the casino licensee, the wager is placed by and the

winnings are paid to the patron in person within the approved hotel facility, the mobile gaming device is inoperable outside the approved hotel facility, and provided that the division may establish any additional or more stringent licensing or other regulatory requirements necessary for the proper implementation and conduct of mobile gaming as authorized by this section.

For the purposes of this subsection, the approved hotel facility shall include any area located within the property boundaries of the casino hotel facility, including any outdoor recreation area or swimming pool, where mobile gaming devices may be used by patrons in accordance with this section, but excluding parking garages or parking areas, provided that mobile gaming shall not extend outside of the property boundaries of the casino hotel facility.

b. Notwithstanding the provisions of any other law to the contrary, the Division of Gaming Enforcement and the New Jersey Racing Commission may authorize the use of mobile gaming devices approved by the division and the commission within a racetrack that operates a sports pool pursuant to the provisions of P.L.2011, c.231 (C.5:12A-1 et seq.), to enable a player to place wagers on sports or athletic events, provided the player has established an account with the permitholder, the wager is placed by and the winnings are paid to the patron in person within the racetrack, the mobile gaming device is inoperable outside the racetrack, and provided that the division and the commission may establish any additional or more stringent licensing or other regulatory requirements necessary for the proper implementation and conduct of mobile gaming as authorized by this section.

For the purposes of this subsection, a racetrack shall include any area located within the property boundaries of the racetrack facility where mobile gaming devices may be used by patrons in accordance with this subsection, but excluding parking garages or parking areas, provided that mobile gaming shall not extend outside of the property boundaries of the racetrack.

N.J. Stat. § 5:12A-5 provides:

§ 5:12A-5. Adoption of comprehensive house rules

Each operator shall adopt comprehensive house rules governing sports wagering transactions with its patrons. The rules shall specify the amounts to be paid on winning wagers and the effect of schedule changes. The house rules, together with any other information the division deems appropriate, shall be conspicuously displayed in the sports wagering lounge and included in the terms and conditions of the account wagering system, and copies shall be made readily available to patrons.

N.J. Stat. § 5:12A-6 provides:

§ 5:12A-6. Agreements to jointly establish sports wagering lounge; taxes; license fee for compulsive gambling programs

Whenever a casino licensee and a racetrack permit holder enter into an agreement to jointly establish a sports wagering lounge, and to operate and conduct sports wagering under this act, the agreement shall specify the distribution of revenues from the joint

sports wagering operation among the parties to the agreement. The sums received by the casino from the joint sports wagering operation shall be considered gross revenue as specified under section 24 of P.L.1977, c.110 (C.5:12-24). The sums actually received by the horse racing permit holder from any sports wagering operation, either jointly established with a casino or established independently or with non-casino partners, less only the total of all sums actually paid out as winnings to patrons, shall be subject to an 8% tax to be collected by the division and paid to the Casino Revenue Fund created under section 145 of P.L.1977, c.110 (C.5:12-145) to be used for the funding of programs for senior citizens and disabled residents and to an investment alternative tax in the same amount and for the same purposes as provided in section 3 of P.L.1984, c.218 (C.5:12-144.1).

A percentage of the fee paid for a license to operate a sports pool shall be deposited into the State General Fund for appropriation by the Legislature to the Department of Health and Senior Services to provide funds for prevention, education, and treatment programs for compulsive gambling programs that meet the criteria developed pursuant to section 2 of P.L.1993, c.229 (C.26:2-169), such as those provided by the Council on Compulsive Gambling of New Jersey, and including the development and implementation of programs that identify and assist problem gamblers. The percentage shall be determined by the division.

SENATE, No. 2460

STATE OF NEW JERSEY

216th LEGISLATURE

INTRODUCED OCTOBER 9, 2014

Sponsored by:

Senator RAYMOND J. LESNIAK

District 20 (Union)

Senator JIM WHELAN

District 2 (Atlantic)

Senator JOSEPH M. KYRILLOS, JR.

District 13 (Monmouth)

Co-Sponsored by:

Senators Beck and Scutari

SYNOPSIS

Partially repeals prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events.

CURRENT VERSION OF TEXT

As introduced.

(Sponsorship Updated As Of: 10/15/2014)

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined <u>thus</u> is new matter.

AN ACT partially repealing the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events, deleting a portion of P.L.1977, c.110, and repealing sections 1 through 6 of P.L.2011, c.231.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) The provisions of chapter 37 of Title 2C of the New Jersey Statutes, chapter 40 of Title 2A of the New Jersey Statutes, chapter 5 of Title 5 of the Revised Statutes, and P.L.1977, c.110 (C.5:12-1 et seq.), as amended and supplemented, and any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such location or to the operation of a wagering pool that accepts such wagers from persons 21 years of age or older situated at such location, provided that the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation.

As used in this act, P.L. , c. (C.) (pending before the Legislature as this bill):

"collegiate sport contest or athletic event" shall not include a collegiate sport contest or collegiate athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place; and

"running or harness horse racetrack" means the physical facility where a horse race meeting with parimutuel wagering is conducted and includes any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act, excluding premises other than those where the racecourse itself was located.

2. (New section) The provisions of this act, P.L. , c. (C.) (pending before the Legislature as this bill), are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event but, rather, are intended and shall be construed to repeal State laws and regulations prohibiting and regulating the placement and acceptance, at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such locations.

3. Section 24 of P.L.1977, c.110 (C.5:12-24) is amended to read as follows:

24. "Gross Revenue" – The total of all sums actually received by a casino licensee from gaming operations, [including operation of a sports pool,] less only the total of all sums actually paid out as winnings to patrons; provided, however, that the cash equivalent value of any merchandise or thing of value included in a jackpot or payout shall not be included in the total of all sums paid out as winnings to patrons for purposes of determining gross revenue. "Gross Revenue" shall not include any amount received by a casino from casino simulcasting pursuant to the "Casino Simulcasting Act," P.L.1992, c.19 (C.5:12-191 et al.). (cf: P.L.2011, c.231, s.7)

4. (New section) The provisions of this act, P.L. , c. (C.) (pending before the Legislature as this bill), shall be deemed to be severable, and if any phrase, clause, sentence, word or provision of this act is declared to be unconstitutional, invalid, preempted or inoperative in whole or in part, or the applicability thereof to any person is held invalid, by a court of competent jurisdiction, the remainder of this act shall not thereby be deemed to be unconstitutional, invalid, preempted or inoperative and, to the extent it is not declared unconstitutional, invalid, preempted or inoperative, shall be effectuated and enforced.

5. Sections 1 through 6 of P.L.2011, c.231 (C.5:12A-1 through C.5:12A-6) are repealed.

6. This act shall take effect immediately.

STATEMENT

This bill implements the decision of the United States Court of Appeals for the Third Circuit in *National Collegiate Athletic Association v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013), wherein the

court in interpreting the Professional and Amateur Sports Protection Act of 1992 (PASPA), 28 U.S.C. § 3701 *et seq.*, stated that it does "not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." *National Collegiate Athletic Association,* 730 F.3d at 232. The court further stated that "it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or *what the exact contours of the prohibition will be.*" *Id.* at 233 (emphasis added). Moreover, the United States in its brief submitted to the Supreme Court of the United States in opposition to petitions for writs of certiorari in the above-referenced case wrote that "PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, *New Jersey is free to repeal those prohibitions in whole or in part.*" United States Brief to the Supreme Court in Opposition to Petitions for Writs of Certiorari (Nos. 13-967, 13-979, 13-980), dated May 14, 2014, at 11 (emphasis added).

APPENDIX I

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant
Attorney General *Washington, D.C. 20530*

September 24, 1991

The Honorable Joseph R. Biden, Jr. Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This presents the views of the Department of Justice on S. 474, the "Professional and Amateur Sports Protection Act."

The proposed legislation would prohibit states from operating, authorizing, advertising, or otherwise promoting a lottery or any other betting, gambling, or wagering scheme that is based, directly or indirectly, on a professional or amateur sports game or performance. The bill contains exemptions for lotteries or other betting activities in a state that were actually conducted by that state prior to August 31, 1990, or were conducted in the state between September 1, 1989, and August 31, 1990. Thus, the sports-based lotteries and betting and wagering activities that are already in operation in Oregon, Nevada, and Dela-

ware would be grandfathered. The proposed legislation also expressly exempts pari-mutuel racing from its prohibitions.

Current Federal law provides a variety of restrictions on the conduct of lotteries and other gambling and betting activities. See, e.g., 18 U.S.C. §§ 1084, 1301-1304, 1953, 1955; 15 U.S.C. §§ 1171-1178. Generally speaking, it is left to the states to decide whether to permit gambling activities based upon sporting events, although Federal law generally prohibits any use of an interstate facility in connection with such sports-based gambling activities.

Section 1307 of Title 18, United States Code, however, expressly permits states to conduct and advertise their own state-authorized "lotteries," as defined in subsection 1307(d). Although Section 1307 specifically excludes the placing or accepting of bets or wagers on sporting events or contests from the definition of permissible state-conducted lotteries, neither the statute nor its legislative history answers the question of whether a state may base its lottery on the outcome of sporting events. See 1974 U.S. Code Cong. & Adm. News 7007 (original enactment of Section 1307); 1988 U.S. Code Cong. & Adm. News 4349 (amendment to Section 1307); see also United States v. Baker, 364 F.2d 107 (3d Cir.), cert. denied, 385 U.S. 986 (1966); United States v. Forte, 83 F.2d 612 (D.C. Cir. 1936). In the absence of any statutory guidance on subsection 1307(d), the Department of Justice has not taken any action against any state operating a sports-based lottery.

Our understanding is that S. 474 is, in effect, intended to clarify the prohibition on wagering on sporting events. As drafted, however, the proposed legislation may render unlawful certain state lotteries that, although they use a sports theme, do not relate to a particular sporting event. For example, a simple scratch lottery ticket that compares the score of one imaginary football team to another would be impermissible under the language of S. 474. Moreover, the bill applies to both individual amateur sports and team amateur sports, but only to team professional sports. The reason for this distinction is unclear.

Also unclear is the purpose of the exception for parimutuel racing in S. 474. Parimutuel racing is not an amateur sport. Therefore, the bill's prohibition on sports-based lotteries would only apply to parimutuel racing absent the express exception – if parimutuel racing were a team sport. Further, the parimutuel racing exception raises questions about the application of the proposed legislation to other sports, such as jai alai.

Finally, we note that determinations of how to raise revenue have typically been left to the states. The Department is concerned that, to the extent the bill can be read as anything more than a clarification of current law, it raises federalism issues. It is particularly troubling that S. 474 would permit enforcement of its provisions by sports leagues.

For these reasons, the Department opposes enactment of S. 474 as drafted. If Congress finds clarification of the sports gambling prohibition of Section 1307 necessary, we suggest that the term "lottery" be more fully defined. The "lotteries" that have prompted the

introduction of S. 474 may not be true lotteries, in that they may involve more than mere chance in determining winners: knowledge of the sports and teams in question may enhance a player's chances of winning. By carefully defining the term "lottery," the problems of overbreadth and ambiguity discussed above may be avoided.

I hope that this response adequately addresses your concerns.

Sincerely,

s/ W. Lee Rawls
W. Lee Rawls
Assistant Attorney General

* * *